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In The
Supreme Court of the United States

MAJOR BANKS, *et al.*,

Petitioners,

v.

NEW YORK LIFE INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court, State Of Louisiana

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Supreme Court of Louisiana violate Article IV, Section 1 of the United States Constitution and fail to give full faith and credit to a final judgment of the Supreme Court of New York, wherein the New York court ruled that a class action was appropriate to resolve and extinguish the claims brought against the New York Life Insurance Company by three and one-half million of its policyholders, including over 100,000 Louisiana policyholders, but the Supreme Court of Louisiana subsequently refused to certify a class action brought by approximately 1,500 Louisiana policyholders that opted out of the New York matter who asserted the same exact claims against the New York Life Insurance Company?

LIST OF PARTIES

Petitioners

Major Banks
Rosetta Nelson
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Lloyd Price
Linda Joseph
Lorraine LeBlanc
Opal Michael

Respondent

New York Life Insurance Company

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OPINIONS BELOW

The opinion of the Supreme Court of Louisiana on Rehearing on the merits appears at Appendix A to the petition and is reported at *Major Banks, et al. v. New York Life Ins. Co.*, 98-0551 (La. 7/2/99) 737 So.2d 1275.

The opinion of the Supreme Court of Louisiana on the merits appears at Appendix B to the petition and is reported at *Major Banks, et al. v. New York Life Ins. Co.*, 98-0551 (La. 12/7/98) 722 So.2d 990.

The opinion of the Louisiana Court of Appeal, First Circuit, on the merits appears at Appendix C to the petition and is reported at *Major Banks, et al. v. New York Life Ins. Co.*, 97 0837 (La.App. 1 Cir. 1997) 705 So.2d 1168.

The order of the Louisiana trial court granting class certification in *Major Banks, et al. v. New York Life Ins. Co.*, No. 30428, 18th Judicial District Court, Division "D", Pointe Coupee Parish, State of Louisiana, entered on November 18, 1996 on the merits appears at Appendix D to the petition and is unpublished.

JURISDICTION

The judgment sought to be reviewed was rendered upon rehearing by the Supreme Court of Louisiana and was entered on July 2, 1999. (Appendix A1). The application for rehearing of the judgment entered by the Supreme Court of Louisiana, on rehearing, on July 2, 1999 submitted by Petitioners was denied by the Supreme Court of Louisiana on September 3, 1999. (Appendix G1).

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Article IV, Section 1 of the Constitution of the United States provides as follows:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

STATEMENT OF THE CASE

A. Louisiana Refused To Certify A Louisiana State Class Action On The Same Claims Brought By The Opt-outs Of A Nationwide Class Action Certified By New York

Petitioners filed suit against New York Life Insurance Company ("New York Life") in a Louisiana state court – *Major Banks, et al. v. New York Life Ins. Co.* (*"Banks"*) – alleging that New York Life used unfair and deceptive practices in the issuance and sale of its life insurance policies. Further, the Plaintiffs in *Banks* opted out of and rejected the nationwide settlement proposed in a class action initiated in New York state court – *Willson v. New*

York Life Ins. Co. ("*Willson*") – concerning the same insurance sales practices used by New York Life. Petitioners sought to certify a class action on behalf of approximately 1,500 Louisiana policyholders that opted out of the nationwide settlement proposed in *Willson*.

The *Willson* court ultimately approved the proposed nationwide class, which extinguished the claims of over three and one-half million policyholders of New York Life, including the claims of over 100,000 of Louisiana policyholders. The *Willson* court found, by final judgment, that all of the requirements for a class action were met, including predominance and superiority. However, the Supreme Court of Louisiana held that a class action could not be certified because the requirements of predominance and superiority were not met, despite the fact that the Plaintiffs' claims brought in *Banks* were essentially the same claims asserted against New York Life in *Willson*.

The issue here is whether the Supreme Court of Louisiana was required by the Full Faith and Credit Clause of the United States Constitution to give preclusive effect in *Banks* to final judgment rendered in *Willson* that all of the requirements were met for a class action, including predominance and superiority.

B. Proceedings Below

The Louisiana trial court in *Banks* certified a class action brought by Petitioners; the class composed of: "All persons who purchased whole or universal life policies from Defendant, NY Life from January 1, 1982 through December 31, 1994, who opted out of the class action

styled *Wilson [sic], et al v. NYL Insurance Company, et al*; filed in the Supreme Court of New York, and who resided in Louisiana at the time they opted out . . . " Appendix D8; See also *Record*, Volume III, p. 907. By definition, the class certified by the trial court in this case was a subset of the class sought by New York Life in *Willson*. The claims asserted in *Banks* were essentially the same claims asserted against New York Life in *Willson*. The trial court's decision to certify this case as a class action was consistent with the class certification determination in *Willson*.

This decision was appealed by Defendant New York Life. The Court of Appeal reversed the ruling of the trial court and held that "the claims of the plaintiffs lack common character, making class certification an abuse of discretion." Appendix, C11. *Banks*, 705 So.2d at 1173.

Petitioners filed for an application for writ of review with the Supreme Court of Louisiana. Petitioners raised four errors in its writ application to the Supreme Court of Louisiana, the fourth error was entitled "The Court of Appeal erred by failing to give effect to the judgment of the *Willson* court that the requirements for a class action, including commonality, were met under the principle of comity." *Id.*, p. 3. The constitutional issue was clearly framed in Petitioners' writ application in the following sentence: "Full faith and credit and comity require that the judgment of the New York Court on the issues that the requirements for a class action were met, including commonality, be given full force and effect in Louisiana." (Petitioner's *ORIGINAL APPLICATION AND MEMORANDUM FOR WRIT OF REVIEW* at p. 4.)

Petitioners argued that the Full Faith and Credit Clause mandated the Louisiana courts to follow the final judgment issued in *Willson* as follows:

> "In a case entitled *Cynthia Speaks, et al. v. New York Life Insurance Company*, No. 95-12441, Civil District Court, Parish of Orleans, State of Louisiana, plaintiffs filed a class action seeking certification of a class identical to the class certified in the present case. The court found that the *Speaks* action to be the same lawsuit as the *Willson* class action. **As a result, the *Speaks* court held that the principles of comity required the courts of Louisiana give full faith and credit to the ruling rendered in *Willson*.**
>
> **The spirit of comity requires Louisiana courts to recognize the determinations of other jurisdictions** unless doing so would violate a positive law or public policy . . . " (Emphasis added.)

Id., p. 17. In the conclusion of their writ application, Petitioners asserted that "the principles of full faith and credit and comity require that the judgment of the New York Court on the issue of commonality be given full force and effect in Louisiana." *Id.*, p. 20.

The full faith and credit argument was restated and amplified in the brief submitted by Petitioners to the Supreme Court of Louisiana once the writ of review was granted. Once again, Petitioners stated that "Full faith and credit and comity require that the judgment of the New York Court on the issues that the requirements for a class action were met, including commonality, be given full force and effect in Louisiana." (Petitioner's *BRIEF SUBMITTED ON BEHALF OF PLAINTIFFS/APPLICANTS,*

MAJOR BANKS, ET AL. FOR WRIT OF REVIEW, p. 3.) and "Likewise, principles of comity require that the findings of the New York court regarding class certification be given full faith and credit." *Id.*, p. 7.

Petitioners emphasized that a settlement class, like that approved in *Willson*:

> "still must satisfy all of the prerequisites for a class action including numerosity, commonality, typicality, adequacy, predominance, and superiority. *Ford*, 96-2913 at *7 (La. 9/9/97) citing *Amchem Products, Inc. v. Windsor*, ___ U.S. ___, 117 S.Ct. 2231, 238 L.Ed.2d 689 (1997). In particular, the requirements of commonality and predominance still must be met even for a settlement class. These requirements were satisfied in the settlement class approved in *Willson* and are, likewise, present in the case *sub judice*."

Id., p. 5.

Petitioners instructed the Supreme Court of Louisiana that New York Life sought class certification in *Willson* to settle the nationwide class action which concerned the same exact issues between the same parties and that New York Life advocated that the proposed settlement class met all of the class certification requirements, including commonality and predominance. Accordingly, Petitioners argued that:

> "NYL (New York Life) should be collaterally estopped from asserting that class certification is inappropriate in this case when it asserted the opposite position in *Willson*, particularly when it is to the detriment of Louisiana citizens.

. . . .

> As a result, the *Speaks* court held that the principles of comity required the courts of Louisiana give full faith and credit to the ruling rendered in *Willson*. Likewise, **principles of comity require that the findings of the New York court regarding class certification be given full faith and credit**." (Emphasis added.)

Id., p. 7.

In the original decision issued by the Supreme Court of Louisiana in *Banks*, the court began its analysis of the case by describing the claims brought against New York Life in *Willson*, outlining the requirements for a class action under New York Civil Practice Law and Rules, and stating the holding of the *Willson* court on the class action issues as follows:

> "The Supreme Court of New York certified the class in its Final Order and Judgment approving the settlement of the class action. See, Willson v. New York Life Ins. Co., No. 94/127804, 1995 N.Y. Misc. LEXIS 652 (N.Y.Sup.Ct. Nov. 8, 1995). The court stated, '[g]iven the settlement . . . the court finds that the requirements of CPLR 901 and 902 [FN3] are satisfied by this settlement.' *Id.*"

Appendix B3, *Banks*, 722 So.2d at 992. Based on the facts set forth in the opinion, the court made the following findings: "Plaintiffs in the instant case have met the requirements for class certification," Appendix B9, *Banks*, 722 So.2d at 994.

Defendant, New York Life, filed an application of rehearing with the Supreme Court of Louisiana which was granted. On rehearing, the court reversed itself and

held that the trial court abused its vast discretion in certifying this matter as a class action. Appendix A18, *Banks*, 737 So.2d at 1283.

Petitioners filed an application for rehearing with the Supreme Court of Louisiana and argued that *Willson* had the effect of *res judicata* in the present case as follows:

> "The issue of whether the claims as asserted by plaintiffs against Defendant New York Life are appropriate for resolution through a class action is an issue that has already been litigated in *Willson v. New York Life Ins. Co.*, No. 94/127804, 1995 N.Y. Misc. LEXIS 652 (N.Y. Sup. Ct., July 31, 1995), aff'd, 644 N.Y.S.2d 617 (1996), cert.dismissed, 66 U.S.L.W. 3001 (U.S. 7/1/97) ("*Willson*").
>
> . . .
>
> In order to extinguish over the claims of over three million policyholders through its nationwide class action settlement, the *Willson* court found that the same claims asserted by plaintiffs in this case met all of the requirements for class certification under CPLR 901 and 902.
>
> . . .
>
> The class action issue was fully developed in *Willson* and has already been litigated in favor of granting class certification. Defendant, New York Life was a party in *Willson* as were other Louisiana policyholders who were in the same position as the Plaintiffs in this case. Therefore, the class action issue is *res judicata* and this Court should not permit Defendant New York Life from arguing to the contrary."

(*APPLICATION OF MAJOR BANKS ET AL. FOR REHEARING*, pp. 17-18.)

The Constitutional issue was identified by Petitioners in its application for rehearing as follows:

> The Louisiana Supreme Court has now, in effect, overruled this prior and thoroughly litigated decision by the court of another State. Certainly, this is in violation of the Full Faith and Credit clause of the United States Constitution and deprives the affected Louisiana residents of due process and equal treatment of the laws as provided by that Constitution." *Id.*, p. 19.

In *Riley v. New York Trust Co.*, 315 U.S. 343, 348-349, 62 S.Ct. 608, 612 (1942), this Honorable Court stated that, through "the Constitutional provision for full faith and credit, the local doctrines of res judicata, speaking generally, become a part of national jurisprudence, and therefore federal questions cognizable here." Accordingly, Petitioners clearly raised and articulated the constitutional issue of whether the Louisiana courts accorded full faith and credit to the final judgment rendered in *Willson* in the proceedings below.

REASONS FOR GRANTING THE PETITION

The issue before this Honorable Court is whether the Supreme Court of Louisiana accorded full faith and credit to a final judgment of the Supreme Court of New York as mandated by Article IV, Section 1 of the United States Constitution, wherein the New York court previously ruled in *Willson*, that a class action was appropriate to

resolve and extinguish the claims brought by three and one-half million of its policyholders, including over 100,000 Louisiana policyholders, that New York Life used false and misleading sales practices. The Supreme Court of Louisiana, in *Banks*, refused to certify the same exact claims brought against New York Life by approximately 1,500 Louisiana policyholders that opted out of *Willson* as a class action in direct contravention to the final judgment of the New York court.

The New York final judgment enjoys preclusive effect nationwide. It is axiomatic that Louisiana courts must give full faith and credit to the *Willson* final judgment issued by New York that the claims of false and misleading practices in the sale of New York Life insurance policies are appropriate for resolution under class action procedure. It is constitutionally essential that Louisiana courts follow this final judgment. Otherwise, the claims of the 1,500 Louisiana policyholders, who have asserted the same claims against New York Life as was asserted in the New York court, will not be addressed because their claims are too small to be litigated by any other method but class action.

I. TWO LAWSUITS AROSE FROM THE SAME SUBJECT MATTER

A. The *Willson* case

The named Plaintiffs in this matter are Louisiana policyholders who opted out of the nationwide class action settlement sought by New York Life, which was certified and ultimately approved by final judgment of

the New York state court in *Willson v. New York Life Ins. Co.*, No. 94/127804, 1995 N.Y. Misc. LEXIS 652 (N.Y. Sup. Ct., July 31, 1995), aff'd, 644 N.Y.S.2d 617 (1996), cert. dismissed, sub nom. *Zoller v. New York Life Ins. Co.*, 521 U.S. 1112, 117 S.Ct. 2500, 138 L.Ed.2d 1006, 65 USLW 3728 (U.S. N.Y. June 24, 1997) ("*Willson*").

Willson was filed in New York state court in September 1994 as a nationwide class action brought on behalf of approximately three and one half million New York Life policyholders. In *Willson*, the class members asserted claims of breach of contract, fraud, and negligent misrepresentation, among others, against Defendant, New York Life. Appendix E3, Findings of Fact, Conclusions of Law, and Final Order and Judgment issued February 1, 1996 in *Willson* ("Final Order and Judgment"), Paragraph 1.

The *Willson* court described the central claims of the *Willson* complaint at Paragraph 3 of its Final Order and Judgment as follows:

> " . . . (*i*) New York Life engaged in a nationwide scheme to induce Class Members to purchase life insurance policies based upon false or misleading sales presentations, policy illustrations, and other marketing or sales materials, and (*ii*) New York Life injured class members through its dividend and interest rate practices and its false or misleading representations about those practices. In particular, for example, the Complaint alleges that New York Life misled Class Members about its premium offset proposal ("POP"), the potential investment or savings aspects of its insurance products, and the costs and benefits of using some or all of the cash

> value of existing policies to purchase new policies."

Appendix E3. These false and misleading sales practices allegedly occurred during the class period of January 1, 1982 through December 31, 1994. *Id.* The parties in *Willson*, including Defendant, New York Life, proposed to extinguish, through a nationwide settlement class, the claims asserted by three and one half million policyholders of New York Life, including the claims of Louisiana residents that owned over 100,000 New York Life policies, that New York Life used false and misleading sales practices to sell its insurance policies.

Under New York law, every class action must satisfy the requirements set forth in New York Civil Practice Law and Rules ("NYCPLR") 901, *et seq.*, which include numerosity, commonality, predominance, typicality, adequacy and superiority. The Supreme Court of New York considered the issue of whether a class action was appropriate to resolve and extinguish the claims of three and one half million policyholders brought against New York Life in *Willson*. The *Willson* court ultimately approved the proposed class action settlement and found that the claims asserted by plaintiffs met all of the requirements for class action certification as required by NYCPLR 901 and 902, including the requirements of predominance [NYCPLR 901(a)(2)] and superiority [NYCPLR 901(a)(5)]. Appendix E19-23.

On the question of commonality and predominance, the *Willson* court, in a crucial finding, stated:

> "There are clearly important issues of law and fact common to the Class, including questions as

> to whether New York Life engaged in a nationwide scheme regarding (i) dividend and interest rate crediting practices and determinations or (ii) sales and illustration practices, and training and supervision with respect to those practices. The Court finds that these common issues of law and fact predominate in light of the ADR Process included in the settlement, which provides interested Class Members the opportunity for individual adjudication of any individual factual and legal issues such as reliance, causation and damages. "

Appendix E19-20. On the issue of superiority, the *Willson* court found "that, given the proposed settlement, a class action is clearly superior to other methods for the fair and efficient adjudication of this controversy." Appendix E23.

B. The *Banks* case

Approximately 1,500 Louisiana policyholders who owned 1,849 policies issued by New York Life, opted out of the proposed nationwide settlement class in *Willson*. Petitioners, the Plaintiffs in *Banks*, rejected the *Willson* settlement and sought to adjudicate the identical claims, which were brought on their behalf in *Willson*, in their own class action filed in January 1996, entitled *Major Banks, et al. v. New York Life Ins. Co.*, No. 30428, 18th Judicial District Court, Pointe Coupee Parish, State of Louisiana.

In their petition, the class representatives in *Banks* alleged that New York Life used unfair and deceptive practices in the issuance and sale of its life insurance policies during January 1, 1982 through December 31,

1994 (the same class period as *Willson*). The petition set forth seven counts of wrongdoing. *Record*, Volume I at pp. 24-29. The *Banks'* Plaintiffs asserted many of the same claims against Defendant, New York Life, that the court in *Willson* found to satisfy the class action requirements.

To wit: Count I of the Plaintiffs' class action petition alleged that New York Life used unfair and deceptive practices to mislead class members about: (1) the benefits of their premium offset proposal ("POP"), (2) the fact that their life insurance policies were not savings or retirement plans, and (3) the amount of dividends each class member would realize by replacing their old policies with new policies. *Record*, Volume I at pp. 24-25; See also Count IV (*Record*, Volume I at p. 26) and Count VII (*Record*, Volume I at p. 29). When compared to the claims brought in *Willson* as described by the *Willson* court at Paragraph 3 of its Final Order and Judgment, Appendix E3, it is clear that *Banks* is a "mirror" suit to the class action certified in *Willson*.

The *Banks* Plaintiffs sought damages and a judgment certifying a class under La Code Civ. P. art. 591, *et seq.*, composed of all persons who purchased whole or universal life policies from New York Life between January 1, 1982 through December 31, 1994, who were residents of Louisiana and who opted out of the *Willson* class action settlement. After careful consideration of the facts and the law following a three-day hearing, the Louisiana trial court reached the same conclusion as the New York court did in *Willson*, *i.e.*, the plaintiffs had met all the requirements for the certification of a class action, including predominance and superiority. Appendix D7, Order

Granting Class Certification, Paragraph 9; also at *Record*, Volume III, p. 906.

The Supreme Court of Louisiana originally found that:

> "this case is proper for class certification because common questions of law and fact predominate over individual issues of law and fact. Each class member stands in an identical position with respect to (1) whether New York Life fraudulently misrepresented the benefits of its 'premium offset proposal', (2) whether New York Life improperly portrayed its life insurance policies as investment, savings, or retirements plans, and (3) whether New York Life's false and misleading marketing materials convinced class members to replace their old policies with new ones."

Appendix B16, *Major Banks, et al. v. New York Life Ins. Co.*, 98-0551 at p. 7 (La. 12/7/98) 722 So.2d 990, 997. Both the trial court (and Supreme Court of Louisiana in its original decision) in *Banks*, as well as the New York court in *Willson*, concluded that the evidence put forth by the Plaintiffs demonstrated that common issues among class members predominated and that the class action was the superior method to resolve the litigation.

However, on rehearing, the Supreme Court of Louisiana reversed itself as well as the trial court's well-founded Order granting class certification and held that the trial court abused its vast discretion in certifying this matter as a class action. Appendix A17, *Major Banks, et al. v. New York Life Ins. Co.*, 98-0551 (La. 7/2/99) 737 So.2d 1275, 1283 (*"Banks"*). The Supreme Court of Louisiana

held that a class action could not be certified because the requirements of predominance and superiority were not met. Appendix A18, *Banks*, 737 So.2d 1275, 1280. The court held "that there are too many individual issues affecting New York Life's and its agents' liability in this case to find that common issues predominate" (*Banks*, 98-0551 at p. 12, 737 So.2d at 1283) and that it could not "find a class action which would result in a multitude of mini-trials to be superior under the circumstances of this case" (*Banks*, 98-0551 at p. 13, 737 So.2d at 1283).

This decision ignores and contradicts the final judgment rendered by the *Willson* court that all of the class action requirements were met, including predominance and superiority, concerning the same exact claims, in violation of the Full Faith and Credit Clause of the United States Constitution.

II. THE SUPREME COURT OF LOUISIANA VIOLATED THE FULL FAITH AND CREDIT CLAUSE BY FAILING TO FOLLOW *WILLSON*

Article IV, Section 1 of the United States Constitution declares that: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." The Supreme Court of Louisiana failed to give the *Willson* judgment the full faith and credit it was entitled to under Article IV, Section 1 of the Constitution of the United States, by reconsidering whether the class action requirements of predominance and superiority were met, as these issues were litigated and resolved by final judgment in *Willson*.

This Court recently described the effect of the Full Faith and Credit Clause in *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 118 S.Ct. 657, 663-664, 139 L.Ed.2d 580 (1998) as follows:

> "A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (res judicata) purposes, [FN5] in other words, the judgment of the rendering State gains nationwide force. See, e.g., Matsushita Elec. Industrial Co. v. Epstein, 516 U.S. 367, 373, 116 S.Ct. 873, 878, 134 L.Ed.2d 6 (1996); Kremer v. Chemical Constr. Corp., 456 U.S. 461, 485, 102 S.Ct. 1883, 1899, 72 L.Ed.2d 262 (1982); see also Reese & Johnson, The Scope of Full Faith and Credit to Judgments, 49 Colum. L.Rev. 153 (1949)." *Baker by Thomas*, 118 S.Ct. at 663-664.

Based on the controlling findings of fact and law set forth in the final judgment rendered by the *Willson* court on February 1, 1996, the Supreme Court of Louisiana was precluded by the Full Faith and Credit Clause from considering whether the requirements for a class action, including predominance and superiority, were met in *Banks*. As this Court put succinctly, "Regarding judgments, however, the full faith and credit obligation is exacting." *Baker by Thomas*, 118 S.Ct. at 663. Therefore, the *Willson* judgment that all of the requirements for a class action were met, including predominance and superiority, gained "nationwide force" and should have been followed by Louisiana and its courts in *Banks*.

In *Riley v. New York Trust Co.*, 315 U.S. 343, 348-349, 62 S.Ct. 608, 612 (1942), *Riley*, this Honorable Court

described the import of the Full Faith and Credit Clause as follows:

> "This clause of the Constitution brings to our Union a useful means for ending litigation. Matters once decided between adverse parties in any state or territory are at rest. Were it not for this full faith and credit provision, so far as the Constitution controls the matter, adversaries could wage again their legal battles whenever they met in other jurisdictions . . . By the Constitutional provision for full faith and credit, the local doctrines of res judicata, speaking generally, become a part of national jurisprudence, and therefore federal questions cognizable here."

Under the doctrine of *res judicata*, "a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, n. 5, 99 S.Ct. 645, 649, n. 5, 58 L.Ed.2d 552 (1979). Therefore, when the *Willson* court rendered a final judgment that the requirements for class action were met, including predominance and superiority, in this matter, those matters were *res judicata* in any subsequent litigation, including *Banks*.

III. THE FINAL JUDGMENT RENDERED IN *WILLSON* IS BINDING ON THE COURTS OF LOUISIANA IN *BANKS*

The beginning point of full faith and credit analysis requires a determination of the effect the judgment has in the courts of the issuing State. The Full Faith and Credit Clause requires Louisiana and its courts to give the final

judgment rendered in *Willson* the same effect as *Willson* has under New York law. *Riley v. New York Trust Co.*, 315 U.S. 343, 349, 62 S.Ct. 608, 612.

Under New York law, "The doctrine of res judicata precludes litigation of matters that could or should have been raised in a prior proceeding between the parties arising from the same factual grouping, transaction, or series of transactions, as well as the relitigation of issues that were actually raised and decided in that proceeding." *New York State Dormitory Authority v. Board of Trustees of the Hyde Park Fire and Water Dist.*, 239 A.D.2d 501, 502, 657 N.Y.S.2d 444, 445 (N.Y.A.D.2 Dept. May 19, 1997) citing *Board of Managers of Windridge Condominiums One v. Horn*, 234 A.D.2d 249, 651 N.Y.S.2d 326 (N.Y.A.D.2 Dept. Dec. 2, 1996); *Koether v. Generalow*, 213 A.D.2d 379, 380, 623 N.Y.S.2d 328 (N.Y.A.D.2 Dept. Nov. 6, 1995).

Defendant, New York Life, proposed to resolve and extinguish the claims asserted by three and one half million policyholders in *Willson* through a nationwide settlement class. In order to qualify for class action certification, New York Life was required to show that the five requirements contained in NYCPLR 901(a) were satisfied, including a demonstration that "there are questions of law or fact common to the class which predominate over any questions affecting only individual members" pursuant to NYCPLR 901(a)(2) and that "a class action is superior to other available methods for the fair and efficient adjudication of controversy" pursuant to NYCPLR 901(a)(5).

The *Willson* court found that the proposed class action met all of the requirements for class action certification set forth in NYCPLR 901, *et seq.* Appendix E 24,

¶ 31. Therefore, the class action issues raised in *Willson* are *res judicata* under New York law and should have been followed by the Supreme Court of Louisiana in *Banks*. The Supreme Court of Louisiana erred by reopening the issue of the appropriateness of class action, which was already adjudged to be proper in *Willson* by final judgment and was subject to the principle of *res judicata* under New York law.

A. Predominance Requirement of NYCPLR 901(a)(2) was met

The test for predominance and superiority are essentially the same under Louisiana and New York class action procedure. Importantly, both the courts of New York and Louisiana look to federal precedent in interpreting their respective class action statute, just as the *Willson* court did in reaching its judgment. Appendix E18, FN2 citing *Colt Indus. Shareholder Litig. v. Colt Indus., Inc.*, 77 N.Y 185, 194, 566 N. E.2d 1160, 1165, 565 N.Y.S.2d 755, 760 (1991); See also *Ford v. Murphy Oil U.S.A., Inc.*, 96-2913, p. 8 (La. 9/9/97), 703 So.2d 542, 547.

The fundamental issue under the predominance test of NYCPLR 901(a)(2) is whether the proposed class action asserts a common legal grievance, *i.e.*, whether the common issues predominate over or outweigh subordinate issues that pertain to individual members of the class. When such predominance is established, it follows that the economies of time, effort, and expense, envisioned by the class action format, may be achieved.

"The use of a predominance test was not meant to create any rigid criteria in determining whether a class action should proceed. It is rather a pragmatic, functional

and ad hoc test to determine whether the proposed class members are more bound together by a mutual interest in the adjudication of common questions than they are divided by the individual members' interest in matters peculiar to them." *Ode v. Smith*, 118 Misc.2d 617, 623, 461 N.Y.S.2d 684, 688 (N.Y. Sup. March 29, 1983) citing 2 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 901.11. The *Willson* court found the predominance requirement to have been met under NYCPLR 901(a)(2). Appendix E19.

Louisiana class action procedure requires that the right sought to be enforced for the members of the class be "common to all members of the class". La. C.C.P. art. 591(1). The common character element of La. C.C.P. art. 591(1) is satisfied when "there exists as to the totality of issues a common nucleus of operative facts. . . . " *McCastle v. Rollins Environmental Services of Louisiana, Inc.*, 456 So.2d 612, 620 (La. 1984). This requirement is satisfied by the finding of the *Willson* court that "every Class Member shares a similar interest with respect to the claims that New York Life's sales dividend and interest rate practices caused injury." Appendix E49.

Similarly, the Louisiana trial court found the same common interest to be present and that these common questions of law and fact predominated. At Paragraph 5 of its Order, the trial court listed many questions of both law and fact found to be common to all members of the *Banks* class, *e.g.*, the Plaintiff's assertion that New York Life breached its duty to disclose relevant information and that its products and sales practices were inherently misleading, supported by a common course of fraudulent conduct emanating from the New York Life home office. Appendix D4-6, Paragraph 5; See also *Record*, Volume III at pp. 904-5. Accordingly, the trial court in *Banks* properly

found that "The evidence submitted indicates that both the common questions of law and the common questions of fact predominate over individualized ones" in accordance with the *Willson* judgment. Appendix D3, Paragraph 5; See also *Record*, Volume III at p. 904.

B. Superiority Requirement of NYCPLR 901(a)(5) was met

The essence of the superiority requirement of NYCPLR 901(a)(5) is to show "that the class suit is the best method of vindicating the rights of the members of the class." 2 Weinstein-Korn-Miller, NY Civ.Prac. § 901.19, 9-67. Perhaps the most significant consideration which favors class actions is the impracticability of an individual suing for the alleged wrong when individual damages are relatively small.

Where, as here, individual damages may not warrant commencement of a lawsuit, the only available method for redress of the alleged wrong would be the class action. As the New York court aptly stated in *Pruitt v. Rockefeller Center Properties, Inc.*, 167 AD2d 14, 24, 574 N.Y.S.2d 672, 677 (1st Dept. 1991), " . . . since the relatively insignificant amount of damages suffered by many members of the class makes individual actions cost prohibitive, and the large number of class members renders consolidation unworkable, a class action is not only superior but, indeed, the only practical method of adjudication." *See* also *Neilan v. Value Vacations, Inc.*, 603 F.Supp. 1227, 1237 (S.D. New York 1985).

The *Willson* court acknowledged this important public policy and found the class action to be the superior method to resolve these claims based, in part, on the

finding that "The large number of Class Members and their relatively small amount of some of their claims support this factor. *Gilman v. Merrill Lynch, Pierce, Fenner & Smith*, 93 Misc. 2d 941, 947-48, 404 N.Y.S.2d 258, 264 (Sup. Ct. N.Y. Co. 1978)". Appendix E23.

The Supreme Court of Louisiana also recognizes this public policy favoring the certification of a consumer class action, where the plaintiffs' claims would otherwise be too small to pursue individually. *McCastle, supra*, 456 So.2d at 619. Yet, in *Banks*, the Supreme Court of Louisiana only mouths the words to this important principle on its way to decertifying the class action and refusing to effectuate this critical public policy. The court states: "While we realize the expense to class members in having to pursue their claims in individual lawsuits, nevertheless, we cannot find a class action which would result in a multitude of mini-trials to be superior under the circumstances of this case." Appendix A17-18, *Banks*, 737 So.2d at 1283. This feigned concern provides no solace to those putative class members who will not have their day in court.

The *Willson* court made the following relevant findings at Paragraph 60(b) of its Final Order and Judgment:

> "(ii) to the extent that variations, in Class Members' age, policy size, policy type, policy status, financial circumstances or type of misrepresentation claim give Class Members somewhat different interests, those interests are not in any way antagonistic and are adequately represented by the Class representatives, one or more of whom share each of the relevant characteristics; and (iii) any such variations do not warrant the creation of subclasses."

Appendix E49. Despite the presence of these "variations" outlined by the *Willson* court, the *Willson* court, through a nationwide class action, resolved and extinguished the claims of over 100,000 Louisiana policyholders on policies sold by the same 1,000 Louisiana agents of Defendant, New York Life, that sold its policies to the plaintiffs and putative class members in *Banks*. However, the Supreme Court of Louisiana improperly refused to follow *Willson* and held that these individual differences precluded class certification. Appendix A, *Banks*, 737 So.2d at 1283.

If the Plaintiffs in *Banks* had not opted out of *Willson*, the same claims asserted in *Banks* against Defendant, New York Life, would have been resolved under the class action certified in *Willson*. When the *Banks'* Plaintiffs were putative class members of *Willson*, New York Life asserted that the claims of the Louisiana Plaintiffs met the requirements for class certification. Did these same exact claims asserted by the Louisiana residents in *Banks* lose the class action characteristics found to exist by the New York state court in *Willson* simply because the plaintiffs sought to adjudicate these same claims in their home state of Louisiana in *Banks*? Of course not.

The Full Faith and Credit Clause is designed to prevent a party, such as Defendant, New York Life, from asserting mutually exclusive positions to the prejudice of another – the Louisiana class members in this litigation. What is good for the goose (class certification was appropriate in *Willson*) is good for the gander (class certification is appropriate in *Banks*). The only material difference between the claims brought in *Willson* and those brought in *Banks* is that this class action was brought on behalf of the citizens of only a single state – Louisiana – which

makes *Banks* a far more manageable class than the nationwide class action than *Willson*.

The cavalier decision of the Supreme Court of Louisiana affronts the Full Faith and Credit Clause. It is well settled by this Honorable Court that a second State has an obligation to give effect to another State's judgments even if the law underlying those judgments contravenes the public policy of the second State. *Estin v. Estin*, 334 U.S. 541, 544-546, 68 S.Ct. 1213, 1216-1217, 92 L.Ed. 1561 (1948) (Full Faith and Credit Clause "ordered submission . . . even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it."); *Fauntleroy v. Lum*, 210 U.S. 230, 237, 28 S.Ct. 641, 643, 52 L.Ed. 1039 (1908) (judgment of Missouri court entitled to full faith and credit in Mississippi even if Missouri judgment rested on a misapprehension of Mississippi law)."

The *Willson* court issued definitive rulings in its final judgment that all requirements for a class action were met. The Louisiana courts as well as New York Life are bound by the *Willson* decision, even if the *Willson* class action could not have been certified under Louisiana class action law.

Therefore, the Supreme Court of Louisiana incorrectly and improperly ruled that *Banks* was not properly certified as a class action by the trial court in violation of the Full Faith and Credit Clause of the United States Constitution, when it failed to follow *Willson* that all of the requirements for a class action were met.

C. If *Speaks* = *Willson* and *Speaks* = *Banks*, then *Banks* = *Willson*

In addition to the *Banks* suit, another action entitled *Speaks, et al. v. New York Life Insurance Company*, No. 95-12441, Civil District Court for the Parish of Orleans ("*Speaks*"), was filed against New York Life alleging it had used false and misleading sales practices to the harm of its policyholders. *Speaks* was filed against New York Life on August 21, 1995, prior to the conclusion of the opt-out period provided in the *Willson* class notice (which ended October 31, 1995). The *Speaks* plaintiffs sought class action certification for a class of all persons who obtained whole or universal life policies from New York Life between January 1, 1982 through December 31, 1994, who were residents of Louisiana.

New York Life filed a motion to enjoin the *Speaks* case from proceeding based on the grounds that *Speaks* was the same case as *Willson*, which had yet to be resolved by final judgment. The court agreed with New York Life that the *Speaks* action was the same lawsuit as the *Willson* class action and held that "No one questions that this lawsuit (*Speaks*) is the same as the class action filed in New York (*Willson*)". Appendix F2, Judgment entered in *Speaks* on September 13, 1995, Page 1; *See* also *Record*, Volume I, p. 17 and Exhibit F to Petitioners' *ORIGINAL APPLICATION AND MEMORANDUM FOR WRIT OF REVIEW*. As a result, the *Speaks* court found that "as a matter of either comity or full faith and credit to the acts of New York, for the above reasons, exercising the discretion granted by La. C. Civ. Pro. Art. 532, I ordered further action in this lawsuit stayed as to those Louisiana residents that do not 'opt out' of the class action in New York" Appendix F2-3.

Banks was filed on January 3, 1996 and *Speaks* was dismissed as the class definition in *Banks* subsumed the class definition of *Speaks*. Since *Speaks* is the same lawsuit as *Willson* and the claims brought in the *Speaks* class action were subsumed by the *Banks* class action, *Banks* is, therefore, the same lawsuit as *Willson*. As a result, the Supreme Court of Louisiana was required to give full faith and credit to the rulings rendered by the New York court in *Willson* (as the court in *Speaks* did), but failed to do so in its judgment rendered in *Banks*.

D. The Settlement Class Action Approved in *Willson* Was Required To Satisfy all of the Class Action Requirements Set Forth in NYCPLR 901, *et seq.*

New York Life has argued that class certification was proper in *Willson* because it was a settlement class rather than a litigation class such as the one in *Banks*. This is a distinction without a difference as New York class action procedure, NYCPLR 901, *et seq.*, does not distinguish a settlement class from a litigation class.

This Honorable Court stressed that the settlement class investigation should be even more rigorous than the litigation class investigation due to the court's high level of duty to the putative class, which may be bound by a case agreed to by the parties, rather than by litigation. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, ___, 117 S.Ct. 2231, 2248, 138 L.Ed.2d 689 (1997). Moreover, this Court held in *Amchem* that "The safeguards provided by the Rule 23(a) and (b) class-qualifying criteria, we emphasize, are not impractical impediments – checks shorn of utility – in the settlement class context." *Amchem Products,*

117 S.Ct. at 2248. As a result, settlement classes "demand undiluted, even heightened, attention." *Id.*

Prior to the class certification of the New York state court in *Willson*, on February 1, 1996, it had been the practice of New York federal courts to make a determination that the requirements of Fed.R.Civ.P. 23 were satisfied even if a class was to be certified for settlement purposes only. *In re Prudential Securities, Inc., Ltd. Partnerships Litigation*, 163 F.R.D. 200, 205 (S.D. New York 1995); *See* also *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 290-292 (2d Cir.1992), *cert. denied*, 506 U.S. 1088, 113 S.Ct. 1070, 122 L.Ed.2d 497 (1993).

The courts of New York are admonished to look to federal precedent in interpreting their respective class action statute. *Colt Indus. Shareholder Litig. v. Colt Indus., Inc.*, 77 N.Y 185, 194, 566 N.E.2d 1160, 1165, 565 N.Y.S.2d 755, 760 (1991). Therefore, New York Life was required to demonstrate to the *Willson* court that the proposed class met all of the requirements for class certification under NYCPLR 901, *et seq.*, in order to have its nationwide settlement class certified. This heightened inquiry must be made prior to reaching the issues of the fairness, adequacy and reasonableness of the proposed settlement, including the ADR process, under NYCPLR 908. Consequently, the *Willson* court was required to find, first, that the settlement class proposed by New York Life satisfied the class action requirements, including predominance and superiority, prior to consideration of the settlement issued even though the *Willson* class action was to be certified for settlement purposes.

CONCLUSION

Under Full Faith and Credit Clause of the Constitution of the United States, the final judgment of the New

York Court rendered in *Willson* which found that the claims brought against New York Life met all of the requirements for a class action, including predominance and superiority, must be given full force and effect in Louisiana and its courts – particularly, the *Banks* matter.

It is unjust and improper to give preclusive effect to the final judgment of *Willson* which extinguished the claims of over 100,000 Louisiana policyholders through a class action, but then refuse to uphold and enforce the court's judgment, that all of the class action requirements were met, including predominance and superiority, with respect to the claims of the 1,500 Louisiana policyholders (formerly of the *Willson* class action) of the class action sought to be certified in *Banks*. Accordingly, the failure of the Supreme Court of Louisiana in *Banks* to follow the controlling final judgment rendered in *Willson*, that the requirements of predominance and superiority were met, violated the Full Faith and Credit Clause of the United States Constitution.

Petitioners respectfully request that this Honorable Court reinstate the Louisiana trial court's ruling which certified this matter as a class action in accordance with the final judgment of *Willson* and reverse the unconstitutional decision rendered by the Supreme Court of Louisiana in *Banks*.

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APPENDIX A

737 So.2nd 1275

Rehearing Denied
(Cite as: 98-0551 (La. 7/2/99), 737 So.2d 1275)

Major BANKS, Christopher Edwards, et al.
v.
NEW YORK LIFE INSURANCE CO., et al.

No. 98-C-0551.

Supreme Court of Louisiana.
July 2, 1999.

C. Jerome D'Aquila, Charles Sterling Lambert, Jules Burton LeBlanc, III, Randy J. Ungar, LeBlanc, Maples & Waddell, New Orleans; Robert M. Johnston, Debra B. Hayes, Adams & Johnston, New Orleans; Christopher A. Kesler, Houston, TX, Counsel for Applicant.

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Clare Frances Jupiter, New Olreans, Stephen J. Goodman, Phillip E. Stano, Counsel for Amicus Curiae American Counsel of Life Insurance.

ON REHEARING

MARCUS, Justice.*

In January, 1996, Major Banks and Charles Edwards, individually and on behalf of all other persons similarly situated, filed suit in the Eighteenth Judicial District Court for the Parish of Pointe Coupee, Louisiana, against New York Life Insurance Company (New York Life) and two Louisiana insurance agents for New York Life.[1] Plaintiffs alleged that New York Life used unfair and deceptive practices in the issuance and sale of its insurance policies.[2] Plaintiffs sought damages and a judgment

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* Kimball, J., not on panel, recused. *See* Rule IV, Part 2, § 3. Victory, J., recused. Judge Marc T. Amy, Court of Appeal, Third Circuit, sitting by assignment in place of Justice Jeffrey P. Victory.

[1] The petition was amended several times to add five more plaintiffs as class representatives and several other Louisiana insurance agents as defendants.

[2] Plaintiffs set forth seven allegations in their petition that New York Life (I) used unfair or deceptive practices when it issued whole life or universal life insurance policies by (a) making use of a premium offset proposal plan and failing to advise plaintiffs of the consequences (b) portraying life insurance policies as investments, savings or retirement plans without disclosing the true nature of the policies (c) carrying out the replacement of existing life insurance policies with new policies or funding new policies in whole or part by using an existing policy's cash value in order to obtain premiums and sales commissions and (d) overstating dividends and benefits to be realized; (II) breached its duty of good faith and fair dealing to its clients by the conduct set forth in Count(I); (III) committed fraud by materially misrepresenting the amount of dividends plaintiffs were to receive under their policies; (IV) committed fraud in the inducement of plaintiffs to purchase policies by

certifying a class composed of all persons who purchased whole or universal life policies from New York Life between January 1, 1982 through December 31, 1994, who are residents of Louisiana and who opted out of the class action settlement styled *Willson et al. v. New York Life Insurance Company et al.* filed in the Supreme Court of New York.[3] After removal of the case to federal court and remand to the state district court, the plaintiffs moved for class certification. Following an evidentiary hearing, the trial judge rendered judgment certifying the class. New York Life appealed. The court of appeal reversed the judgment of the trial court finding that the claims of the plaintiffs lacked common character, making class certification an abuse of the trial judge's discretion.[4] Upon

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materially misrepresenting the benefits to be realized under the policies and failing to disclose the costs and profits of the company; (V) committed negligent misrepresentation and omission in the sale of its life insurance policies; (VI) committed negligence by violating the duty to plaintiffs and class members to use ordinary care and diligence in the sale of its policies; and (VII) breached its oral and written contracts with plaintiffs when it promised that a single prepayment of premiums at the time of purchase or payment of premiums during a fixed period of years would be sufficient to carry the cost of the policies for life without reducing the death benefit of the policies and by failing to furnish an investment plan product suitable for each purchaser's purposes.

[3] No. 94/127804, N.Y. Misc. LEXIS 652 (N.Y.Sup.Ct. Nov. 8, 1995), aff'd 228 A.D.2d 368, 644 N.Y.S.2d 617 (1996), *cert. dismissed sub nom., Zoller v. New York Life Ins. Co.*, 521 U.S. 1112, 117 S.Ct. 2500, 138 L.Ed.2d 1006 (1997).

[4] *Banks v. New York Life Ins. Co.*, 97-0837 (La.App. 1st Cir. 12/29/97); 705 So.2d 1168.

application of plaintiffs we granted certiorari.[5] On original hearing, we reversed the judgment of the court of appeal and reinstated the judgment of the trial court certifying the class. We concluded that common questions of law and fact predominated over individual issues because each class member stood in the same position with respect to the alleged misrepresentations by the company concerning its life insurance policies and marketing materials.[6] New York Life applied for rehearing contending that the majority focused exclusively on the purported conduct of New York Life in reaching the conclusion that common issues of law and fact predominated over individual concerns and failed to consider relevant evidence of each class representative's conduct and experience in its inquiry. New York Life further argued that if misrepresentations were made as plaintiffs claim, they were the result of individual agents making misrepresentations to individual persons in violation of New York Life's policies and procedures. Such individualized matters preclude a finding of common character so as to make class certification a superior vehicle in this case. We granted New York Life's application for rehearing to address these concerns.[7]

Factual Background

Plaintiffs' claims arise from their purchase of various life insurance policies from 1982 through 1994. During

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[5] 98-C-0551 (La.5/29/98); 719 So.2d 1270.

[6] 98-C-0551 (La.12/7/98); 722 So.2d 990.

[7] 98-C-0551 (La.3/12/99); ___ So.2d ___.

this period, the marketing and sale of New York Life policies were conducted by approximately a thousand agents. These agents sold about 101,109 policies to Louisiana residents, of which approximately 1,850 are encompassed within the class. Plaintiffs purchased whole life and/or universal life policies. Beginning in the early 1980's New York Life began to base the method of projecting interest and dividend rates of their life insurance policies on a higher rate of return based upon the market of the past few years rather than a rate previously used. It also began to offer new methods of paying premiums. Some of the purchasers of whole life policies selected the Premium Offset Proposal ("POP") whereby premiums would be paid by automatically deducting them from dividends earned under the policies. Because the POP procedure depends upon the accumulation of dividends that can vary from year to year and are not guaranteed, the utilization of this feature could reduce the number of years that out-of-pocket premium payments must be made but not necessarily void the obligation to pay premiums which remain payable for the life of the policyholders. The New York Life home office developed the dividend scales and interest rates and investment return projections on the policies. Based on these assumptions, premium costs and cash value projections were calculated.

New York Life agents were trained by the home office and marketing materials came from the home office. During the class period, illustrations such as charts and explanatory brochures were available to assist agents in the sales presentations. New York Life alleges that explanatory materials stated that dividends were not

guaranteed, and by 1987, software automatically placed on every page of an illustration a notice stating that dividends and cash values were not guaranteed. Sales presentations were individualized. Each agent developed a different relationship with each policyholder. Some policies were sold after numerous conversations and lengthy meetings while others were sold after group presentations at work sites and with very little interaction with premiums being paid through voluntary payroll deductions. Each agent had his or her own method of marketing and selling insurance policies. The record further reveals a diverse group of representative plaintiffs, with varying levels of sophistication and experience who purchased life insurance policies in different years from different New York Life agents in different sales situations.

Major Banks purchased four whole life policies for himself and family members for the purpose of accumulating cash values that could later be borrowed against to pay college expenses. He met his agent at work after a group presentation. The agent provided Banks with illustrations showing the premiums and potential cash value of the policies. Major Banks stated that he read the language on the illustrations stating that values shown are based on current dividends which are not guaranteed. He complains that the illustrations he saw at the presentation differed from those attached to his policies and further alleges that he was told by his agent that his policies would accumulate cash value after the third year. He has retained each policy and they have accumulated some cash value and he has also purchased another policy.

Rosetta Nelson, who owned insurance from several different companies, purchased employee whole life policies on the lives of her children in 1992 for the purpose of obtaining death benefits from two New York Life agents who visited the work site. She conversed with only one agent and was not given any illustrations prior to her purchase. She complains that she was not informed of the additional benefits of her life insurance policies when she bought them.

Marilyn Ferrara bought her policy from an agent she had known for years. She has owned other New York Life policies. She met with the agent only once and saw no illustrations. She chose to pay her premium over a five year period for a total of $23,640 but ceased paying and surrendered herpolicy [sic] after paying $21,000. Upon surrender she received $336 over the $21,000 she had paid in premiums.

Lloyd Price knew his agent, met with him several times and complained that based on the illustrations he received, he thought the accumulated dividends and cash values on his whole life insurance policy were guaranteed to "POP" after eight years. He complains that his agent did not emphasize the writing on the illustrations that dividends were not guaranteed and out-of-pocket payment of premiums may be required. As of the date of the certification hearing, the eight year period had not expired and his policy was still in force.

Linda Joseph purchased the policies at issue after a divorce. She had owned other New York Life policies. Her agent advised her to surrender two existing policies and use the cash value as the initial payment on a new

universal life policy to get a greater death benefit at a lower premium. She complains that she thought her policy would have greater cash value although she admitted she took a loan out against the policy and she did receive a net gain in cash value after paying costs and expenses.

Lorraine LeBlanc, a bank executive, thought when she purchased her policy she would pay only one initial premium, but found out in 1993 that dividends were not sufficient to pay premiums under her "POP" plan. She was given illustrations by her agent that she did not read. Her policy is still in effect and she has only paid her initial premium with the others satisfied by deductions from the policy amount.

Last, Opal Michel, a real estate broker, has owned life insurance for many years, knew her agent for many years and met with him several times. The agent provided illustrations. She complains that the actual cash values of the policies are not the same as the amounts reflected on the illustrations. She has not paid any out-of-pocket premiums except for the initial payment.

LAW

La Code Civ. P. arts. 591 through 597 establish the basic requirements for a class action in Louisiana:[8]

1. A class so numerous that joinder is impracticable, and

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[8] Arts. 591-597 were amended and reenacted by La. Acts 1997, No. 839, § 1, eff. July 1, 1997. However, the amended version does not apply to this action since it was commenced in January of 1996.

2. The joinder as parties to the suit one or more persons who are

(a) members of the class, and

(b) so situated as to provide adequate representation for absent members of the class, and

3. A "common character" among the rights of the representatives of the class and the absent members of the class.

See McCastle v. Rollins Environmental Services of La., Inc., 456 So.2d 612, 616 (La.1984); *State ex rel. Guste v. General Motors Corp.*, 370 So.2d 477, 479 (La.1979) (on rehearing). In *Stevens v. Bd. of Trustees of Police Pension Fund*, 309 So.2d 144, 151 (La.1975), we noted that existence of a common question of law or fact does not by itself justify a class action as involving a common character of the right to be enforced even though the parties are too numerous to be joined practicably and even though adequate representation is afforded by the class members to the suit. The requirement of a "common character" restricts the class action to those cases in which it would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated without sacrificing procedural fairness or bringing about other undesirable results. In determining whether a class action in a particular case will promote fairness and efficiency, the trial court must actively inquire into every aspect of the case and should not hesitate to require showings beyond the pleadings. *McCastle*, 456 So.2d at 616-618.

La.Code Civ. P. arts. 591-597 were modeled after Federal Rule 23 as originally enacted. After amendment of Rule 23 in 1966, our courts have used the factors set forth

in Rule 23(b) as guidelines to determine whether to allow a class action. *Stevens*, 309 So.2d at 150-151. Recently in *Ford v. Murphy Oil U.S.A., Inc.*, 96-2913 (La.9/9/97); 703 So.2d 542, this court directed Louisiana courts to be guided by the standards for class certification set forth in Rule 23(b).[9] Rule 23(b)(3) provides that the court must find that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and

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[9] Rule 23(a) sets forth four threshold requirements that must be satisfied before a case is certified as a class action: One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

In addition to satisfying these four prerequisites, the party seeking class certification must show that the action falls within one of the categories listed in Rule 23(b). In this case, plaintiffs seek to certify the class pursuant to Rule 23(b)(3), which provides that the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in their particular forum; (D) the difficulties likely to be encountered in the management of a class action.

efficient adjudication of the controversy. To determine whether common issues predominate, *a crucial question* is whether the case would be manageable as a class action. The trial judge is given wide discretion in determining whether to allow class actions using the factors listed in Rule 23(b) and the "fairness" factors enunciated in *Stevens*. *See Ford*, 703 So.2d at 547-548.

Applying the factors set forth in Articles 591-597 and Federal Rule 23 and the state and federal jurisprudence interpreting our state articles and the federal rule, we find for the reasons set forth below that the trial judge abused his discretion in certifying this case as a class action.

ANALYSIS

In *Ford*, we refused to certify a class of individuals and property owners who alleged physical, property and business losses as a result of emissions from four separate petrochemical plants. In rejecting the appellate court's finding that the issue of defendant's duty predominated over individual questions, this court reasoned:

> However, far from offering the same facts, each class member will necessarily have to offer different facts to establish that certain defendants' emissions, either individually or in combination, caused them specific damages on yet unspecified dates (which dates may run into the hundreds or even thousands). The causation issue is even more complicated considering the widely divergent types of personal, property and business damages claimed and considering each plaintiffs' unique habits, exposures, length

> of exposures, medications, medical conditions, employment, and location of residence or business. . . . Lastly, the mere finding of "defendants' duty" not to pollute will do little to advance the issues in this case. There appear to be far too many individual liability issues which could not be tried separately, as that is prohibited by article 593.1(C)(1). 703 So.2d at 549.

Because the individual liability issues predominated over the issue of defendant's duty, we concluded that a class action was not appropriate. Like *Ford,* when we focus upon the allegations of each of the seven representative class members, we are exposed to a myriad of individualized complaints that ultimately will require plaintiff-by-plaintiff adjudication of liability issues thereby militating against a finding of predominance of common character and the superiority of the class action procedure.

First, we recognize the essence of plaintiffs' claims are fraud and negligent misrepresentation causes of action committed by New York Life and its agents. In *Young v. Ray Brandt Dodge, Inc.*, 176 F.R.D. 230 (E.D.La.1997), plaintiffs brought suit for certification of a class of Louisiana automobile buyers who purchased and financed liability insurance from defendants. In denying certification the court reasoned that because the underlying claims are based on fraud, a reliance of each aggrieved person as to each credit purchase must be shown. A fraud class action cannot be certified when individual reliance will be an issue. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir.1996); *Kirkham v. Am. Liberty Life Ins. Co.*, 30,830 (La.App. 2nd Cir. 8/19/98); 717 So.2d 1226, 1229, (quoting *Simon v. Merrill Lynch*, 482 F.2d 880,

882 (5th Cir.1973)) (if there is any material variation in the representation made or in the degree of reliance thereupon, a fraud case may be unsuited for treatment as a class action). In determining whether fraudulent or negligent misrepresentations have occurred, the circumstances surrounding each purchase by each policyholder must be examined to determine whether the purchaser relied on representations made either in written documents or by a particular agent and if so, whether the representations affected the circumstances of each sale.[10]

The misrepresentations in this case were allegedly written in the illustrations and based upon oral statements by the individual insurance agents. For example, plaintiff Ferrara testified that her agent did not show her illustrations. Plaintiff Michel alleges that she relied upon oral representations made by her agent that contradicted the illustrations that were provided. Major Banks claims the illustrations he saw prior to purchase differed from those received with his policies and he further claims that his agent told him he would accumulate cash value on his policy. We find that the trial court would be required to scrutinize each plaintiff's case individually to determine

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[10] The record reflects that New York Life instructed its agents (who became independent contractors after three years) in writing that the illustrative scale of dividend payments was not guaranteed and that out-of-pocket premium payments could be required beyond the illustrative dates. New York Life further cautioned its agents to take special care in selling smaller policies under the premium offset plan. Finally, New York Life emphasized that policies should be sold under the premium offset plan only after full disclosure that premiums were not guaranteed.

whether the oral representations were at odds with the written disclosures and analyze whether plaintiffs relied upon oral statements, written materials or both. In *In Re Jackson Nat. Life Ins. Co. Premium Litig.*, 183 F.R.D. 217 (W.D.Mich.1998), plaintiffs sought class certification claiming as their core theory that Jackson National's vanishing premium illustrations, which were prepared by staff in the home office, were premised upon unsupported and unsustainable interest rates. In finding plaintiffs' predominance assertion lacking, the court stated:

> It is acknowledged by plaintiffs that Jackson National did not generally communicate directly with prospective consumers or policyholders. Communications were made primarily by independent insurance brokers; brokers who were not subject to and did not follow uniform policies regarding distribution of policy illustrations. Some shared available illustrations with consumers, some did not.
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> . . .
>
> Thus, determination of whether and which illustrations were given to class members, and of the nature of oral representations made to them at the point of sale, elements of obvious and undeniable importance to all of plaintiffs' claims, are matters requiring individualized fact development. This militates against a finding that the common questions of fact posed even by plaintiffs' narrowed core theory predominate. 183 F.R.D. at 221.

See also Peoples v. Am. Fidelity Life Ins. Co., 176 F.R.D. 637, 645 (N.D.Fla.1998) (certification denied where reliance by the purchaser on both the oral presentations

and written materials will result in mini-trials for thousands of purchasers); *Rothwell v. Chubb Life Ins. Co. Of Am.*, No. 96-83-B (D.N.H. March 31, 1998) (certification denied where court found that policy illustrations were non-uniform and each insurance agent used individualized sales practices).

The next issues that plaintiffs must prove on a class-wide basis are causation and injury-in-fact. In a tort action, plaintiff bears the burden of proving by a preponderance of the evidence both the injury and a causal connection between the injury and the tort. *Lasha v. Olin Corp.*, 625 So.2d 1002, 1005 (La.1993). Again, when individualized questions of causation and injury predominate over common issues then class certification is inappropriate. In *Brown v. New Orleans Public Service, Inc.*, 506 So.2d 621, 623 (La.App. 4th Cir.), writ denied, 508 So.2d 67 (La.1987), the court of appeal explained that in a mass tort class action, the causative link between the defendant's conduct and the plaintiffs' injuries is the same for all plaintiffs and the only issue that varies is the extent of damages. However, the court found that the case did not present such a situation when each member of the class had to prove that the utility's negligence as a result of a power outage caused the injury rather than some other cause such as the extremely cold temperatures, a cause for which the utility company could not be held liable. In *Banks v. Travelers Ins. Co.*, 60 F.R.D. 158 (E.D.Pa.1973), plaintiffs sought class certification based upon allegations that a sales representative of Travelers intentionally made false statements regarding the terms of a disability insurance policy. In refusing to certify the class, the court concluded:

> To collect money damages, each plaintiff must show which false statements he heard and which of those statements he relied upon in the purchase of the insurance. Each must then prove that he has a medical disability and that his individual different medical condition fell between the terms of the insurance policy and the representations made. That is, each must show that the misrepresentation caused the loss. Finally, they must prove that each member of the class complied with the contractual preconditions for collection of benefits. . . . Consequently, a judgment for one plaintiff would have very little effect on the outcome of another suit. 60 F.R.D. at 163.

Proof of causation and injury-in-fact in the instant case could be complex and individualized. For example, it is uncertain from the depositions of plaintiffs Ferrara and Joseph whether they suffered any injury at all. Joseph acknowledged that the failure of her policy to accumulate cash value as quickly as contemplated may have resulted from her action in taking a loan against the policy. It is questionable whether either plaintiffs LeBlanc and Michel have suffered any injury in that their policies with New York Life are still in effect and they have yet to pay any out-of-pocket premiums. We conclude in the instant case that causation and injury-in-fact will be difficult if not impossible to prove on a class-wide basis since each member of the class must prove that the alleged fraud or misrepresentation and not some other cause resulted in an injury to him.

Finally, we should consider the possibility that New York Life may assert affirmative defenses to plaintiffs' allegations such as comparative fault and prescription. In

Brown, 506 So.2d at 623, the court of appeal noted that the availability and validity of defenses such as comparative negligence will depend upon the actions of each claimant under the particular circumstances of his alleged loss. The conduct of many of the named plaintiffs in this case demonstrates their own comparative fault could reduce or even eliminate the potential for recovery. Some were sophisticated life insurance buyers, while others admitted they failed to read their policies and pay attention to the illustrations given to them by their agents. Moreover, some claims may be prescribed in that plaintiffs were aware of the alleged misrepresentations based on the policy's failure to perform as expected and may have failed to take timely action.

In sum, we conclude that there are too many individual issues affecting New York Life's and its agents' liability in this case to find that common issues predominate. As stated in *In Re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 220 (E.D.La.1998), "[w]hen defendant's conduct means different things for different class members, trying the issue of its liability for that conduct on an aggregated basis is problematic." Moreover, we conclude that a class action would not be superior to other procedural methods in this case when we balance in terms of fairness and judicial efficiency the merits of a class action against alternative procedural methods. Plaintiffs argue that many claims are small and they are without the means to pursue their claims on an individual basis; therefore, fairness dictates that we certify this class. While we realize the expense to class members in having to pursue their claims in individual lawsuits, nevertheless, we cannot find a class action

which would result in a multitude of mini-trials to be superior under the circumstances of this case.

Accordingly, we find that the trial judge abused his discretion in granting class certification in this matter. The court of appeal was correct in reversing the judgment of the trial court.

DECREE

For the reasons assigned, the judgment of the court of appeal is affirmed. The case is remanded to the trial court for further proceedings consistent with the views expressed herein. All costs are assessed against plaintiffs.

CALOGERO, C.J., dissenting.

I respectfully dissent. The plaintiffs' complaints originate from the allegation that New York Life, as a corporate entity, engaged in consumer fraud when it sold insurance policies to them, representing as a major benefit the policies' ability to build cash value, with the knowledge or likely knowledge that its premium offset proposal was not sufficient to pay all future premiums beyond a limited period as projected, and that the policyholders would eventually have to resume paying regular premiums. The insurance products and the associated premiums necessary to keep the policies in force were developed by New York Life itself with certain dividend scales, values, assumptions, mortality experience, expenses, lapse rates, interest rate and investment return projections. According to plaintiffs' allegations, premium costs and cash value projections were then calculated and marketed by New York Life to the public in the form of

materials provided by New York Life and through sales agents trained by New York Life. Those materials cited as a major benefit to the policy holder the policy's ability to build cash value and, in a short time, enable policy coverage without future premium payments for the remaining life of the policy. Underlying the plaintiffs' allegations of fraud, use of deceptive sale practices, and breach of its duty of good faith is the common complaint that the policies did not generate sufficient cash value to perform as represented. The source of contention in this case is a corporate decision to market and sell policies which the corporation allegedly knew or should have known would not produce the benefits projected. I believe that common issues do predominate over individual ones, and that the causative link between New York Life's conduct and the plaintiffs' injuries is indeedthe [sic] same for all plaintiffs.

Moreover, the district court in this case found class certification appropriate. Recognizing the vast discretion imparted to the district court judge in making such a determination, I cannot say that there was an abuse of that discretion in this case. This is why I subscribed to the majority opinion on original hearing and would now on rehearing reinstate that judgment of this Court.

APPENDIX B

722 So.2d 990
(Cite as: 98-0551 (La. 12/7/98), 722 So.2d 990)

Major BANKS, Christopher Edwards, et al.

v.

NEW YORK LIFE INSURANCE CO., et al.

No. 98-C-0551.

Supreme Court of Louisiana.

Dec. 7, 1998.

C. Jerome D'Aquila, Charles S. Lambert, Jr., Jules B. LeBlanc, III, LeBlanc, Maples & Waddell, Baton Rouge; Randy J. Ungar, Robert M. Johnston, Adams & Johnston, New Orleans; Debra B. Hayes, Houston, TX, Charles B. Colvin, New Orleans, for Applicant.

Eugene R. Preaus, Maura Z. Pelleteri, Preaus, Roddy & Krebs, New Orleans; Phillip A. Wittman, Patrick W. Pendley, Plaquemine, Stephen H. Kupperman, Robert E. Harrington, New Orleans, for Respondent.

Clare F. Jupiter, New Orleans, Stephen J. Goodman, Phillip E. Stano, Washington, DC, for Amicus Curiae, American Council of Life Insurance.

JOHNSON, Justice.*

We granted Plaintiff's application for writ of certiorari to determine whether the court of appeal erred in reversing the district court's certification of Plaintiffs'

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* Kimball, J., not on panel, recused. *See* Rule IV, Part 2, § 3. Victory, J., recused. Judge Marc T. Amy, Court of Appeal, Third Circuit, sitting by assignment in place of Justice Jeffrey P. Victory.

class. *See, Banks v. New York Life Ins. Co.*, 97-0837 (La. Ct.App. 1 Cir. 12/12/97), 705 So.2d 1168, 1173. After reviewing the record and the jurisprudence, we hold that this action is appropriate for class certification.

Facts

On September 8, 1994, Irene and Robert Gillette filed a complaint in the Supreme Court of New York[1], New York County, against New York Life Insurance Company and New York Life Insurance Annuity Corporation (hereinafter collectively referred to as "New York Life"). *See, Gillette v. New York Life Ins. Co.*, No. 94/125903 (N.Y. Sup.Ct. filed Sept. 8.1984). The Gillettes filed the complaint on behalf of a putative[2] nationwide class of New York Life policy owners. In subsequent months, additional Plaintiffs, seeking to represent nationwide classes of New York life policy owners, filed three more lawsuits. *See, Willson v. New York Life Ins. Co.*, No. 94/127804 (N.Y. Sup.Ct. filed Sept. 18, 1994); *Villamil v. New York Life Ins. Co.*, No. 95/112433 (N.Y. Sup.Ct. filed May 16, 1995); *Silva v. New York Life Ins. Co.*, 95/114850 (N.Y. Sup.Ct. filed June 13, 1995). These lawsuits were consolidated on June 29, 1995 under the caption *Willson v. New York Life Ins. Co.*, No. 94/127804.

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[1] The name "Supreme Court" is misleading. The Supreme Court is the court of original jurisdiction in the state of New York. *See*, N.Y. Const. art. VI, § 7.

[2] The term "putative" as used in class action procedure refers to the temporary status of an action which may be certified as a class action or a party who may be considered a member of the class once it is certified.

The consolidated complaint contained two allegations. First, the complaint alleged that New York Life engaged in a nationwide scheme to induce class members to purchase life insurance policies based on false or misleading sales presentations, policy illustrations, and other marketing or sales materials. Second, the complaint alleged that New York Life injured class members through its dividend and interest rate practices and its false or misleading representations about those practices.

The Supreme Court of New York certified the class in its Final Order and Judgment approving the settlement of the class action. *See, Willson v. New York Life Ins. Co.*, No. 94/127804, 1995 N.Y. Misc. LEXIS 652 (N.Y.Sup.Ct. Nov. 8, 1995). The court stated, "[g]iven the settlement . . . the court finds that the requirements of CPLR 901 and 902[3] are satisfied by this settlement." *Id.*

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[3] CPLR 901 and 902 refers to the New York Civil Practice Law and Rules sections 901 and 902. Section 901 provides, "One or more members of a class may sue or be sued as representative parties on behalf of all if: (1) the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable; (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (4) the representative parties will fairly and adequately protect the interests of the class; and (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy." N.Y. C.P.L.R. 901 (McKinney 1997).

Section 902 provides, "Within sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so

In January 1996, Major Banks and Charles Edwards filed suit against New York Life in the Eighteenth Judicial District Court for the parish of Point Coupee. They filed suit for themselves individually and as representatives of all Louisiana residents who opted out of the settlement in *Willson v. New York Life Ins. Co.* In their petition, the class representatives charged New York Life with seven counts of wrongdoing. (R. at 24-29). Count I alleges that New York Life used unfair and deceptive practices to mislead class members about: (1) the benefits of their "premium offset proposal", (2) the fact that their life insurance policies were not savings or retirement plans, and (3) the amount of dividends each class member would realize by replacing their old policies with new policies. (R. at 24-25). Count II alleges that New York Life breached its duty of good faith and fair dealing by knowingly misrepresenting pertinent facts and insurance policy provisions. (R. at 25). Count III alleges that New York Life committed

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maintained. An order under this section may be conditional, and may be altered or amended before the decision on the merits on the court's own motion or on motion of the parties. The action may be maintained as a class action only if the court finds that the prerequisites under section 901 have been satisfied. Among the matters which the court shall consider in determining whether the action may proceed as a class action are: (1) The interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) The impracticability or inefficiency of prosecuting or defending separate actions; (3) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (4) The desirability or undesirability of concentrating the litigation of the claim in the particular forum; (5) The difficulties likely to be encountered in the management of a class action." N.Y. C.P.L.R. 902 (McKinney 1997).

fraud by making material misrepresentations to class members with the intent of inducing them to invest in whole life or universal life insurance policies. (R. at 26). Count IV alleges that New York Life committed fraud in the inducement by materially misrepresenting the amount of dividends that class members would receive under their new life insurance policies. (R. at 26). Count V alleges that New York Life committed negligent misrepresentation and omission by failing to disclose the excessiveness of their administrative costs and by failing to disclose the real reasons for replacing the class members' old policies with new ones. (R. at 27). Count VI alleges that New York Life was negligent in (1) offering for sale and selling life insurance policies, (2) representing that the policies would provide benefits and services that they did not provide, (3) recommending life insurance policies with a "premium offset proposal," and (4) churning insurance policies. (R. at 28). Lastly, Count VII alleges that New York Life breached its contract with class members by promising that the payment of premiums for a fixed period of years would be sufficient to carry the cost of the policies during the life of the class members, when in fact class members would be required to pay higher premiums in the future. (R. at 29).

Judge Marionneaux, of the Eighteenth Judicial District Court, conducted three days of evidentiary proceedings on Plaintiffs' motion for class certification. He granted Plaintiffs' motion for class certification on November 18, 1996. Judge Marionneaux certified a class composed of all persons who purchased whole or universal life insurance from New York Life from January 1, 1982 through December 31, 1994, who opted out of the

settlement in *Willson v. New York Life Ins. Co.*, No. 94/127804, 1995 N.Y. Misc. LEXIS 652 (N.Y.Sup.Ct. Nov. 8, 1995), and who resided in Louisiana at the time they opted out.

New York Life appealed the class certification asserting that the district court's interlocutory judgment would cause irreparable injury. On appeal, the first circuit considered the sole issue of whether the trial court erred in certifying the class. *See, Banks v. New York Life Ins. Co.*, 97-0837, p. 3 (La. Ct.App. 1 Cir. 12/29/97), 705 So.2d 1168, 1169. The first circuit found that the trial court abused its discretion by certifying the class. They held that the plaintiffs' claims lacked "common character" making class certification inappropriate.

Discussion

The class action is a nontraditional litigation procedure which permits a person to sue on behalf of a larger class of persons if certain requirements are met. The purpose of the class action is to adjudicate and obtain res judicata effect on all common issues applicable not only to persons who bring the action, but to all others who are similarly situated. *Ford v. Murphy Oil U.S.A., Inc.*, 96-2913, p. 4 (La.9/9/97), 703 So.2d 542, 544.

Louisiana's class action statute is found in articles 591 through 597 of the Louisiana Code of Civil Procedure.[4] Under article 591(A), one or more representatives may sue on behalf of all others similarly situated if:

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[4] The term "Class Action Statute" is the generic term used throughout the Louisiana Code of Civil Procedure to refer to articles 591 through 597.

> the persons constituting the class are so numerous as to make it impracticable for all of them to join or be joined as parties, and the character of the right to be sought to be enforced for or against the members of the class is: (1) common to all members of the class . . .

La.Code Civ. Proc. Ann. art 591(A) (West 1960)[5]. In *Stevens v. Board of Trustees,* 309 So.2d 144 (La.1975) we recognized that the trial judge has vast discretion in determining whether to certify a class. In *Stevens,* we directed Louisiana trial judges to use Federal Rule of Civil Procedure 23(b) as a guide in determining whether to certify a class action. *Stevens,* 309 So.2d at 150. Rule 23(b) provides that a class may only be certified if the court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members. Fed.R.Civ.P. 23(b)(3)[6].

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[5] Louisiana Code of Civil Procedure article 591(A) was amended by Acts 1997, No. 839, § 1. However, the amended article 591(A) does not apply to this action. The newly formulated article 591(A) only applies to actions filed on or after July 1, 1997. This instant action was filed in January 1996.

[6] Federal Rule of Civil Procedure 23 provides a list of several factors to be considered when deciding whether to certify a plaintiff class. Rule 23(b) provides in its entirety that a court should only certify a plaintiff class if it finds that:

> (1) The prosecution of separate actions by or against individual members of the class would create a risk of:
>
> (a) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

The appellate courts will only decertify a class where there is an abuse of the trial judge's vast discretion. Louisiana's class action statute is largely derived from Federal Rule of Civil Procedure 23. Therefore, reference to cases that interpret the federal class action statute is appropriate where there is a lack of Louisiana jurisprudence on a particular issue. *See, Williams v. State,* 350 So.2d 131, 133 (La.1977) (stating Louisiana class action

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(b) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to these findings include:

(a) The interest of the members of the class in individually controlling the prosecution or defense of separate actions;

(b) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(c) The desirability or undesirability of concentrating the litigation in the particular forum;

(d) The difficulties likely to be encountered in the management of a class action;

statute was adapted largely from Federal Rule of Civil Procedure 23).

Plaintiffs in the instant case have met the requirements for class certification. Louisiana Code of Civil Procedure article 591 requires that the class be so numerous that joinder of all members would be impracticable. The potential class in this case consists of the owners of one thousand eight hundred and forty nine (1,849) life insurance policies. Clearly, a class of this size meets the numerosity requirement. In *Thomas v. Charles Schwab & Co.*, 95-1279 (La. Ct.App. 3 Cir. 9/25/96), 683 So.2d 734, the third circuit court of appeal held that 114 potential class members met the numerosity requirement because joinder of 114 persons would not be conducive to judicial economy.

The appellate court was of the opinion that Plaintiffs failed to meet the "commonality" requirement of article 591. Article 591 requires that there be questions of law and fact common to the class. Plaintiffs allege that New York Life established a "premium offset proposal" where the accumulated dividends from the insurance policy were supposed to pay future premiums. (R. at 24). However, these dividends did not materialize and the class members' premiums actually increased. (R. at 22). Plaintiffs' also allege that New York Life improperly portrayed life insurance policies as investments, savings, or retirement plans. Lastly, Plaintiffs allege that New York Life replaced the existing policies of class members with new life insurance policies and that these replacements were funded using the existing cash value of the old policies. New York Life allegedly convinced class members to replace their old policies by overstating the dividends

and other benefits to be realized from the new policies. (R. at 35).

Plaintiffs allege that the agents sold the new policies using false policy illustrations and other misleading marketing materials. *See,* (R. at 29). These sales materials were created by New York Life's home office and distributed to individual sales agents by New York Life. (R. at 1391). Defendants assert, and the appellate court found, that Plaintiffs' claims lack common character because the alleged false representations were made by individual insurance agents. However, Plaintiffs' claims still have common character because the corporate entity, New York Life, was allegedly aware that the materials used by its agents were false and misleading. Dr. Claude C. Lilly[7], an expert witness for the plaintiffs, testified at the class certification hearing that

> New York Life knew its premium offset proposal was not sufficient to pay all future premiums and that the policyholder would eventually have to resume the payment of premiums. Dr. Lilly stated, "New York Life knew the rates would not hold up. . . . [T]his Actuary indicates that they (New York Life) had done some sensitivity analysis on the product to determine what impact interest rate or variability would have. . . . It says "Unlike a policy that has truly become paid up, a future dividend scale decrease could force a policy . . . to become premium paying again". . . . So even at its

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[7] Dr. Lilly is a chartered life insurance underwriter with a Ph.D. in Risk Management Insurance.

> inception, before they went forward with the product, they knew it was intra-sensitive.

(R. at 1051). Additionally, the agents who made the alleged false representations were trained by New York Life. Jay Feinberg, a Vice-President at New York Life, testified that New York Life generates the training materials to teach the agents how to sell the products. (R. at 1391).

Lastly, Mr. Feinberg testified that New York Life's home office determined the amount of dividends that would be paid on whole life policies. Therefore, they allegedly knew that the sales agents were overstating the dividends and other benefits to be realized from the new policies. The evidence adduced at the hearing clearly shows that the class members' claims of fraud are properly directed at defendant New York Life rather than at individual agents.

New York Life relies on *Ford v. Murphy Oil U.S.A.* in concluding that this class lacks "commonality." However, the instant case in distinguishable from *Ford*. In *Ford*, the plaintiffs brought an action against four petrochemical plants in St. Bernard Parish. The named defendants in *Ford* were *Murphy Oil USA, Inc., Mobil Oil Corporation, ChemCat Corporation,* and *Calciner Industries, Inc.* The plaintiffs were individuals and property owners who alleged physical, property and business losses as a result of the continuous emissions from the four separate plants. This court refused to certify the class in *Ford* stating that, " . . . claims arising from the torts of individual defendants are not appropriate for class action as there is no common cause as to those claims for all class

members." With four different sources of emissions, it was impossible for one representative plaintiff to prove causation or liability issues for the class.

This court also refused to certify the class in *Ford* because the plaintiffs' theory of recovery raised an issue of first impression in Louisiana. Federal courts, and this court, will not certify a class where the theory of law involved in the case is novel and untested. The plaintiffs in *Ford* claimed that the "synergistic accumulation" of emissions from the four petrochemical plants caused injury to their persons, properties, and businesses. *Ford*, 703 So.2d at 543. This court found that the plaintiffs' "synergy" theory of recovery was "novel and untested" in Louisiana, making it difficult to determine whether common issues of law and fact would exist in such a case. *Id.* at 551. We stated in *Ford* that, " . . . the court must have experience with a tort in the form of several individual actions before it can certify issues in a way that preserves judicial resources." *Id.* The instant case can be further distinguished from *Ford* because the issues in the case sub judice are not novel theories of law, but are concepts that have been previously addressed by Louisiana courts. In *Kirkham v. American Liberty Life Insurance Company*, 30830 (La. Ct.App. 2 Cir. 8/19/98), 717 So.2d 1226, a class of policyholders brought an action against American Liberty Life Insurance Company (hereinafter "American Liberty"). They alleged that American Liberty breached its contract with its policyholders by promising that the payment of premiums for six or seven years would be sufficient to carry the cost of the policy during

the life of the policyholders, when in fact, the policyholders would be required to continue paying premiums. *Kirkham*, 717 So.2d at 1227. The class also alleged that American Liberty fraudulently misrepresented whole life insurance policies as "retirement plans" or "investments." *Id.* The court of appeal de-certified the class because the plaintiffs failed to introduce sufficient evidence of commonality. *Id.* at 1228-29. The court stated, "[w]ith no showing of deficiencies in the written contract of insurance, we find predominant the individual issues of fact [concerning] the alleged misrepresentations in the sales of the policies . . . " *Id.* at 1226. In many respects, the facts and legal issues in *Kirkham* are similar to those in the instant case. Class members in both cases seek to recover damages for fraud and breach of contract in the sale of life insurance policies. Thus, because of *Kirkham*, the present case differs from *Ford* in that the issues in this case are neither novel nor untested in Louisiana.

It must be noted that *Kirkham* is distinguishable from the instant case in two very important respects. First, the plaintiffs in *Kirkham* alleged that American Liberty committed fraud through the oral representations of the sales agents. The plaintiffs failed to show that the written insurance contracts contained a common contractual flaw or trap for the purchasers of the policies. Therefore, the plaintiffs' only basis of recovery required them to show a common scheme of oral misrepresentations. Plaintiffs in the instant case allege that New York Life committed fraud through its policy illustrations and other marketing materials. It is fairly well settled that a fraud case may be unsuited for class certification where the alleged misrepresentations were committed through oral statements.

See, Crasto v. Estate of Kaskel, 63 F.R.D. 18, 22 (S.D.N.Y. 1974); *Morris v. Burchard,* 51 F.R.D. 530 (S.D.N.Y.1971). However, class certification is appropriate where common issues are found to predominate over individual issues and where the fraudulent misrepresentations appear in a standardized document or similarly common disclosure. *See, Green v. Wolf Corp.,* 406 F.2d 291, 300-01 (2d Cir.1968) (holding that class was proper for certification and that common issues predominated over individual issues, where alleged misrepresentations were made in standard prospectus issued to class members); *See* also, Kent A. Lambert, Certification of a Class Action in Louisiana, 58 La. L.Rev. 1085, 1103 (1998). The instant case, although factually similar to *Kirkham,* meets "the commonality" requirement for class certification because the alleged misrepresentations were made through New York Life's standardized marketing materials.

Secondly, *Kirkham* is distinguishable from the instant case because American Liberty was not responsible for the selection and training of salespersons nor was it responsible for the marketing of its insurance policies. *Kirkham,* 717 So.2d at 1228. The plaintiffs asserted that W. Sherrill Little was the general agent of American Liberty and that he contracted with them to market their insurance policies and train their salespersons. It is unclear whether the salespersons in *Kirkham* were independent contractors or direct employees of American Liberty. However, it is clear in the instant case that New York Life trained its sales agents. *See,* (R. at 1391). It is also clear that New York Life furnished its sales agents with marketing materials. *Id.*

The Louisiana Fourth Circuit Court of Appeal recently distinguished *Ford* and affirmed class certification in *Andry v. Murphy Oil U.S.A., Inc.*, 97- 0793 (La. Ct.App. 4 Cir. 4/1/98), 710 So.2d 1126. In *Andry*, several class action law suits were filed in relation to an explosion at an oil refinery. The trial court certified the class and the oil company appealed the certification. The oil company attempted to rely on *Ford* in arguing that the class should not have been certified. However, the court of appeal refused to apply *Ford* stating:

> [t]he defendant's reliance on *Ford* is misplaced. The facts of the instant case are decidedly different from those in *Ford*. Unlike the instant case, *Ford* involved a class of plaintiffs suing four different and distinct entities claiming that the emissions and pollutants each entity released . . . had a synergistic, damage-causing impact on the community.

Andry, 710 So.2d at 1131. The instant case is more similar to *Andry* than to *Ford*. In this case, New York Life is the only defendant. Plaintiffs allege that each improper action was caused solely by New York Life.

This court established in *McCastle v. Rollins Environmental Services of Louisiana, Inc.*, 456 So.2d 612 (La.1984) that situations involving multiple or long-term incidents do not preclude class certification. In *McCastle*, a class action was brought against the operator of a chemical waste disposal site. The Plaintiffs alleged that the activities of the defendant between 1980 and 1981 caused them to suffer physical injuries. In *McCastle*, each plaintiff would be required to individually show that defendant's conduct injured them in some way. However, this court

held that the plaintiffs met the "commonality" requirement because they were all injured by the same conduct. The fact that this conduct occurred for a period of one year, rather than involving one incident, did not preclude this court from certifying the class. The instant case is similar to *McCastle* as well. The class members in this case claim that they were all injured by the same conduct. That is, they all allege that their injuries were caused by the misrepresentations and fraudulent behavior of New York Life. Although they must prove individual injuries, they allege that their injuries were caused by the same "common" conduct. Therefore, Plaintiffs meet the commonality requirement of article 591(A)(2).

CONCLUSION

We conclude that this case is proper for class certification because common questions of law and fact predominate over individual issues of law and fact. Each class member stands in an identical position with respect to (1) whether New York Life fraudulently misrepresented the benefits of its "premium offset proposal", (2) whether New York Life improperly portrayed its life insurance policies as investment, savings, or retirements plans, and (3) whether New York Life's false and misleading marketing materials convinced class members to replace their old policies with new ones.

The action of the Court of Appeal, First Circuit, is hereby reversed. The judgement of the Eighteenth Judicial District Court, certifying the class, is hereby reinstated. We remand this case to the trial court for further proceedings.

REVERSED and REMANDED.

LEMMON, J., subscribes to the opinion and assigns additional reasons.

MARCUS, J., dissents.

KNOLL and TRAYLOR, JJ., dissent for reasons assigned by MARCUS, J.

LEMMON, J., subcribing to the opinion and assigning additional concurring reasons.

Allegations of consumer fraud raise the common issue of law and fact in this case. The focus of the allegations of consumer fraud on the officers and executives of New York Life, rather than on the agents and employees, cause the questions of law and fact common to the members of the class to predominate over any questions affecting only individual members, as explained more fully by the majority opinion.

I write separately to point out that the class action is superior to other available methods of procedure because, in addition to the reasons stated in the majority opinion, approximately 1,500 Louisiana citizens who owned over 1,800 policies opted out of the national class action settlement, thereby signaling their intention to litigate their claims in a class action already filed in Louisiana.[1] *See* Fed.R.Civ.Proc. 23(b)(3)(b), which lists, as one of the factors bearing on the predominance issue, the extent and nature of any litigation concerning the controversy commenced by members of the class. Separate actions in

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[1] The pending class action was dismissed after the present class action was filed.

Louisiana by the approximately 1,500 persons who opted out in New York would have to be consolidated, at least as to the common issues of law and fact discussed above and in the majority opinion. Moreover, the class representatives in the present action alleged that separate actions were not practical because many claims were too small for efficient litigation. *See McCastle v. Rollins Environmental Serv. of La., Inc.*, 456 So2d 612 (La.1984). The class action, therefore, is clearly the superior method of procedure.[2]

MARCUS, Justice, dissenting.

I disagree with the majority that plaintiff met the "commonality" requirement in this case. The class members were not injured by the same conduct. As the majority noted, the representatives here alleged seven counts of wrongdoing on the part of the sales agents of New York Life during a period of twelve years, including misrepresentation, failure to disclose information, and improper "churning" or internal replacement of policies. Therefore, I do not believe that this action is appropriate for class certification. Accordingly, I respectfully dissent.

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[2] The reliance of the class members on the alleged misrepresentations is a secondary issue which may have to be tried separately along with the amount of individual damages.

APPENDIX C

705 So.2d 1168, 97 0837 La.App. 1 Cir. 12/29/97,
Banks v. New York Life Ins. Co., (La.App. 1 Cir. 1997)

705 So.2d 1168

97 0837 La.App. 1 Cir. 12/29/97

Major BANKS, Christopher Edwards, et al.

v.

The NEW YORK LIFE INSURANCE CO., et al.

No. 97 CA 0837-R.
Court of Appeal of Louisiana,
First Circuit.

Dec. 29, 1997.
Rehearing Denied Feb. 2, 1998.

Randy J. Ungar, New Orleans, Robert M. Johnson, New Orleans, C. Jerome D'Aquila, Debra Brewer Hayes, and Andres Pereira, New Roads, Jules B. LeBlanc, Baton Rouge, for Plaintiffs-Appellees Major Banks, Christopher Edwards, et al.

Eugene R. Preaus, New Orleans, Patrick W. Pendley, Plaquemine, Nancy J. Marshall, New Orleans, Phillip A. Whittman, New Orleans, Stephen J. Goodman, Washington, DC, for Defendant-Appellant The New York Life Insurance Co., et al.

Before LeBLANC and FITZSIMMONS, JJ., and CHIASSON, J. Pro Tem.[1]

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[1] Judge Remy Chiasson, retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

[97 0837 La.App. 1 Cir. 3] REMY CHIASSON, Judge Pro Tem.

The sole issue in this appeal is whether the trial court erred in granting certification as a class action.

In January, 1996, plaintiffs filed suit in the Eighteenth Judicial District Court, for the Parish of Pointe Coupee, Louisiana, for themselves individually and as representatives of all persons similarly situated, against The New York Life Insurance Company (N.Y. Life). After removal of the case to federal court and remand, the plaintiffs moved for class certification.[2] On November 18, 1996, the district court rendered an interlocutory judgment certifying a class composed of:

> All persons who purchased whole or universal life policies from Defendant, N.Y. Life from January 1, 1982 through December 31, 1994, who opted out of the class action styled *Wilson [sic], et al v. New York Life Insurance Company, et al;* filed in the Supreme Court of New York, and who resided in Louisiana at the time they opted out. . . .

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[2] The instant case is a mere tip of the proverbial iceberg, for it is subsequent to a nationwide class action against the same defendant, *Willson v. New York Life Insurance Co.*, No. 94/127804, 1995 N.Y. Misc. LEXIS 652 (Nov. 8, 1995), *aff'd*, 228 A.D.2d 368, 644 N.Y.S.2d 617 (App.Div.1996), *cert. dismissed*, ___ U.S. ___, 117 S.Ct. 2500, 138 L.Ed.2d 1006 (1997), filed in the state of New York. Thus, the class certified by the trial court in the instant case is defined as persons who opted out of the nationwide class action. Furthermore, there is evidence in the record of other suits in federal and state courts that are related to the claims being asserted herein.

Asserting that the interlocutory judgment would cause irreparable injury, N.Y. Life perfected this appeal. NY Life assigns the following errors:

> 1. The District Court erred in concluding that plaintiffs established by competent evidence that claims based on the sale of 1,849 different insurance policies through among 1,000 independent agents to individual policyowners share sufficient "common character" to support class adjudication, particularly in light of overwhelming individualized issues requiring proof from each separate class member as to the occurrence of oral representations, injury-in-fact, causation, reliance, comparative negligence and prescription.
>
> 2. The District Court erred in concluding that plaintiffs carried their burden of demonstrating that the claims of purported class representatives are sufficiently typical of the claims of the class to allow the representatives adequately to represent the class.
>
> 3. The District Court erred in concluding that plaintiffs carried their burden of establishing that a class action is the superior method of adjudicating plaintiffs' claims.
>
> 4. The District Court erred in concluding that plaintiffs established by competent evidence that members of the class are sufficiently numerous to render joinder impracticable.

[97 0837 La.App. 1 Cir. 4] STANDARD OF REVIEW

The appellees, Major Banks, Linda B. Joseph, Rosetta Nelson, Lloyd Price, Marilyn H. Ferrara, Lorraine LeBlanc, and Opal Michel, assert on appeal that our

review of certification of a class action is subject to the manifest error rule. Conceding that several courts of appeal have followed this standard of review in class action certification contests, N.Y. Life points out that the Louisiana Supreme Court has not addressed the appropriate standard directly, and N.Y. Life seeks a *de novo* review.

We find that the proper standard of review is an abuse-of-discretion standard. We reach this conclusion after having the benefit of a thorough analysis of the Louisiana class action by the Louisiana Supreme Court in the recent case of *Ford v. Murphy Oil U.S.A., Inc.*, 96-2913, 96-2917, 96-2929 (La.9/9/97), 703 So.2d 542. The court explained:

> The class action is a nontraditional litigation procedure permitting a representative with typical claims to sue or defend on behalf of, and stand in judgment for, a class of similarly situated persons when the question is one of common or general interest to persons so numerous as to make it impracticable to bring them all before the court. *See* Herbert B. Newberg & Alba Conte, *1 Newberg on Class Actions*, § 1.01, p. 1-2, 1-3 (3d ed.1992). The purpose and intent of class action procedure is to adjudicate and obtain *res judicata* effect on all common issues applicable not only to the representatives who bring the action, but to all others who are "similarly situated," provided they are given adequate notice of the pending class action and do not timely exercise the option of exclusion from the class action.

* * *

In 1961, Louisiana enacted Articles 591-597 of the Code of Civil Procedure, modeled after [the] original Federal Rule 23. However, the redactors of the Code of Civil Procedure rejected the hybrid and spurious class action models, authorizing only "true" class actions. La. C.C.P. art. 591, Comment (c). In 1966, Federal Rule 23 was amended, eliminating the three categories of class actions. Accordingly, the statutes governing class actions in Louisiana originated from the federal class action statute . . . with the express legislative intent to recognize only "true" class actions under the original federal rule because of the availability of Louisiana's liberal joinder and intervention rules.

* * *

Early Louisiana class action jurisprudence recognized the stringent common interest requirements of the original Rule 23 "true" class action, although the tests employed by the circuits differed. We first interpreted this provision in *Stevens v. Board of Trustees of Police Pension Fund*, 309 So.2d 144 (La.1975). In *Stevens*, we held that the fact that different recoveries are sought, based upon the same factual transaction and same legal relationship, was not intended to defeat a class action. . . . In discussing the term "common character of the right sought to be enforced," we looked to the federal rules and noted that those rules were revised in 1966 because of the "difficulty of characterization required by this term of indefinite and imprecise [97 0837 La.App. 1 Cir. 5] meaning" and to describe "in more practical terms the occasions for maintaining class actions." *Id.* [at 150].

> **We thus adopted what we then called the "discretionary grant" given to trial judges in amended Federal Rule 23(b) as guidelines to be used by Louisiana courts in determining whether to allow a class action. *Id.***
>
> * * *
>
> In sum, in *Stevens*, we substantially liberalized the availability of class actions under Louisiana law *by giving judges wide discretion in determining whether to allow class actions* using the factors listed in Rule 23(b) and the "fairness" factors enumerated in *Stevens*, rather than following the [Louisiana] legislative intent of allowing only "true" class actions. (Emphasis supplied.) (Footnotes omitted.)

703 So.2d at 544-48.

Considering the Louisiana Supreme Court's emphasis on the wide discretion placed in the trial court, we will examine the record before us to determine whether the trial court's certification of the class action was an abuse of discretion.

CERTIFICATION OF CLASS ACTION

The requirements for a class action, as set forth in LSA-C.C.P. arts. 591 and 592, are: (1) a class so numerous as to make it impractical for all of the persons to join or be joined as parties; (2) the joinder of parties who are members of the class and able to provide adequate representation for absent members; and (3) a "common character" between the rights of the representatives of the class and the absent members. *Cotton v. Gaylord Container*, 96-1958, 96-2029, 96-2049 (La.App. 1st Cir. 3/27/97); 691

So.2d 760, *writ denied*, 97-0800 & 97-0830 (La.4/8/97); 693 So.2d 147. Finding that the plaintiffs herein failed to establish the third requirement, common character, we hold the instant case is inappropriate for class action certification, and the trial court judge abused his discretion in so certifying it. As defendant asserts in its first assignment of error, the trial court erred in finding that a common character existed between the claims of the seven appellees and other persons who purchased 1,849 whole or universal life policies from 1,000 independent insurance agents. Indeed, the record reveals a lack of common character among the seven appellees.

Major Banks bought four whole life policies for himself and family members from an agent he met with individually following a group presentation. Mr. Banks bought the policies to accumulate cash values that later could be borrowed against to pay college expenses. He now complains that the illustrations the agent showed him prior to the purchase [97 0837 La.App. 1 Cir. 6] differed from the illustrations he later received with his policies. However, he did not complain when he received the policies in 1993. Mr. Banks also claims the agent orally assured him of cash values, but he concedes each policy did accumulate cash value, and he still has the original four policies plus another N.Y. Life policy.

Linda B. Joseph's claim in the instant suit is based on a policy on her own life and a policy on the life of her son Gregory. Although she had her policies replaced after the initial purchase, her only complaint herein is that she thought her policy would have a greater cash value by now. However, despite a loan she took out, Ms. Joseph has made a net gain in cash value.

Rosetta Nelson purchased employee whole life policies on the lives of her children in 1992, solely to obtain the death benefits. Later she discovered the policies might be used to provide retirement benefits in the future. Her only complaint is that she was not told of this additional benefit at the time of purchase. She still owns the N.Y. Life policies and does not plan to surrender them.

Lloyd Price bought a whole life policy in 1989 from a former acquaintance to supplement the retirement he would receive for his years of employment as a school counselor with a masters degree. He complains that his agent did not emphasize that the policy dividends are not guaranteed to be sufficient to pay premiums after eight years. When the instant action went to court for certification, the eight years had not lapsed and Mr. Price still had his policies.

Marilyn H. Ferrara bought a universal life policy in 1991 from an agent she had known for years. She chose a premium payment plan of $4,728 per year, for a total of $23,640. However, after paying only $21,000 in premiums, she surrendered the policy and received cash of $21,336. According to Ms. Ferrara's expert, her only complaint is that she may not be able to purchase other life insurance now.

Lorraine LeBlanc is a senior bank executive who claims she wanted to buy a policy but make only one premium payment. Her agent provided her with an illustration of such a purchase, but she admits the illustration also pointed out that dividends may not be sufficient

always to pay premiums. She has been billed for premiums after the first year, but she has [97 0837 La.App. 1 Cir. 7] chosen to have them satisfied by deductions from the initial policy amount. Her complaint is that she will incur injury if she has to pay more premiums.

Opal Michel and her husband bought two whole life policies in 1987 from an agent she had known for more than 10 years. The agent showed them an illustration reflecting premiums of $7,300 yearly. Ms. Michel claims the agent told her the $7,300 figure marked "premiums" represented a tax-free annual income. Although both of the Michels' policies state that premiums are due for the remainder of the insured's life, they have never paid any out-of-pocket premium beyond the first premium. Their complaint is that the actual cash values of their policies now are not the same as those on the original illustrations. Ms. Michel's expert witness admitted that her situation is "unique."

To satisfy the requirement of common character, the mover must establish that questions of law or fact common to the members of the class predominate over any questions affecting only individual members. Despite the obvious differences in the facts of the seven appellees' claims, the district court found 15 questions of law and fact that were "common" and predominated over individualized ones. An examination of only a few of the questions illustrates a lack of commonality.

First, "whether N.Y. Life had a duty of full disclosure to the policy holders and whether or not N.Y. Life fulfilled its duty to the policyholders." Our examination of the record made by the seven appellees convinces us that

a factual determination would be required to conclude whether N.Y. Life fulfilled its duty of disclosure to one or more of the appellees. This issue is an individual one, not one common to all seven appellees, much less not common to the remaining hundreds of class members.

Second, "whether N.Y. Life, through its compensation structure, policies and procedures encouraged 'churning' or internal replacements of policies." The only appellee whose claim involves a replacement policy is Ms. Joseph. It is unknown how many class members would be making a claim for "churning."

Third, "whether N.Y. Life failed to supervise and train its agents." The agents who sold policies to the seven appellees had varying years of experience. Their training by N.Y. Life, as well as the training of the other 993 agents will present individual, not common, questions of fact.

[97 0837 La.App. 1 Cir. 8] The above examples illustrate the fact that the common issues of liability of defendant to the individual class members do not predominate over the individual issues of causation and damages. *Cf., Cotton v. Gaylord Container,* 691 So.2d at 771. Our finding that common questions do not predominate in the instant case is consistent with the holding of the United State [sic] Supreme Court in *Amchem Products, Inc. v. Windsor,* ___ U.S. ___, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), wherein the court affirmed the Third Circuit's decertification of a nationwide asbestos case brought for settlement purposes because the class failed the "predominance"

requirement and the "adequacy" requirement. In decertifying the class, the court noted that "disparate questions" undermined class certification; class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods of time. *Id.* Likewise, factors that complicate the causation inquiry in the instant case are that plaintiffs purchased different policies, for different purposes, from different agents, and with different results. Because the plaintiffs have failed to demonstrate a common character of their claims, we cannot say that certification of a class action would achieve "economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *McCastle v. Rollins Environmental Services of Louisiana, Inc.*, 456 So.2d 612, 616 (La.1984).

We find that the claims of the plaintiffs lack common character, making class certification an abuse of discretion; it is unnecessary for us to discuss the other errors urged by the appellant. We reverse the judgment of the trial court, assessing appellees with the costs of this appeal.

REVERSED.

FITZSIMMONS, J., concurs, and assigns additional reasons.

[97 0837 La.App. 1 Cir. 1] FITZSIMMONS, Judge, concurring, with additional reasons.

A class action in Louisiana requires that the "character of the right" to be enforced is "[c]ommon to all

members of the class. . . . " La. C.C.P. art. 591. This codal article mandates a greater relationship than a simple sharing of common questions of law and fact. Some common nucleus of operative facts within the totality of issues must exist. These common issues must dominate the individual issues. Fairness to the parties and judicial efficiency must also be considered before a class action can be properly certified. *See Ford v. Murphy Oil U.S.A., Inc.*, 96-2913 pp. 9-11 (La.9/9/97), 703 So.2d 542.

The claims of the class are based on the sale of over 1800 individual policies, not directly by N.Y. Life, but by approximately 1000 insurance agents, to individual policyholders during a period of 13 years. The nature of the individual transactions over such a lengthy period of time does not meet the criteria for a class action in Louisiana. There is no common nucleus of operative facts here. The individual issues predominate over the common issues. The need for lengthy testimony by individual agents and policyholders on the issues of causation and liability would not foster fairness to the parties or judicial efficiency. This is especially true considering the outcome of the forerunner "settlement class" certified in another jurisdiction: the attorneys received 22 million dollars in fees; the litigants could negotiate a return to a "whole life policy" from their "universal life policy." [97 0837 La.App. 1 Cir. 2] Obviously, it is more economically prudent for N.Y. Life to agree to a settlement that would "sweeten the pot" for fees at the expense of the litigants, who were the true victims of any wrongful acts. Class actions are a good device to promote justice for the individual litigant who is too poor, or whose recovery would be too small, to tackle the corporate Goliath. *See Amchem*

Products, Inc. v. Windsor, ___ U.S. ___, 117 S.Ct. 2231, 2246, 138 L.Ed.2d 689 (1997). It is not the concept that is flawed; it is the abuse of that concept that needs correction by the judiciary and the legislature.

For these reasons, I believe that the trial court abused its discretion in certifying the class. I respectfully concur.

APPENDIX D

MAJOR BANKS, ET AL. INDIVIDUALLY AND AS REPRESENTATIVE OF ALL PERSONS SIMILARLY SITUATED	NUMBER 30,428 DIV. "D"
	18TH JUDICIAL DISTRICT COURT
VERSUS	PARISH OF POINTE COUPEE
THE NEW YORK LIFE INSURANCE COMPANY, ET AL.	STATE OF LOUISIANA

****

ORDER GRANTING CLASS CERTIFICATION

On this 24th day of October, 1996, came on to be heard Plaintiffs' Motion for Class Certification and after three days of evidentiary proceedings and due consideration of the pleadings on file, the memoranda, briefs and exhibits in support of, and against class certification, the evidence, and the arguments of counsel, it is the opinion of the Court that the requirements of Article 591, *et seq.* of the Louisiana Code of Civil Procedure have been met and the requested Class should be certified.

In conjunction with the Order, the Court makes the following findings of fact and conclusions of law.

A. Findings of Fact

1. Plaintiffs seek that the Court certifies a class against The New York Life Insurance Company ("NY Life") which is defined as follows:

a. All persons who purchased whole or universal life policies from Defendant NY Life from January 1, 1982 through December 31, 1994, who opted out of the class action styled *Willson, et al v. New York Life Insurance Company, et al*, filed in the Supreme Court of New York, and who resided in Louisiana at the time they opted out; and

b. Excluded from the Class are all claims for personal injury by Class Members; and

c. Also excluded from the Class are defendants; any parent, subsidiary, affiliate, or controlled person of any defendant; the officers, directors, agents, servants, or employees or any of the same; and the Members of the immediate families of any such person.

2. Notice shall be given by United States mail to the last known address of all Class Members that can be identified through reasonable efforts. Notice shall also be given through the publications in all of the major Louisiana cities to include New Orleans, Baton Rouge, Lafayette, Alexandria, Monroe, Lake Charles and Shreveport. The notice shall provide sufficient information for the potential Class Members to either remain in the Class or to opt out of the Class by using the included exclusion form. Any Class Member who receives notice and fails to return an exclusion form by the designated deadline shall be presumed to have consented to the jurisdiction of the court and to desire to be included in the class. Any Class Member who fails to return an exclusion form and who desires to be excluded from the class must present extrinsic evidence that notice was not received in order to be excluded.

3. Plaintiffs have submitted credible evidence that the Class is so numerous that joinder of all Members is impracticable. It has been stipulated by NY Life that there are 1849 policies, the owners of which, meet the class definition. Based on the foregoing and the evidence submitted at the class certification hearing, the Court finds that the numerosity requirement has been met.

4. Plaintiffs have submitted credible evidence that there is a well defined community of interest and common character of rights sought to be enforced for the Members of the Class and between the rights of the Class Representatives and the absent Class Members. The discovery in this case is voluminous. To date, over 400,000 pages of documents have been produced by NY Life. Plaintiffs have deposed six NY Life representatives for submission at the class certification hearing. Five of those depositions were taken in New York City, New York, where NY Life's home office is located. Documents are still being produced by NY Life and discovery is still on going at this time. The Court finds that the volume, complexity and logistics of this case will require substantial resources and thus, substantial economies of time, effort and expenses will be realized by the certification of the Class.

5. Plaintiffs have submitted credible evidence that there are many questions of both law and fact which are common to all Members of the Class. The evidence submitted indicates that both the common questions of law and the common questions of fact predominate over individualized ones. Some of these questions include:

a. whether NY Life, through conduct that emanated from the top down and was systemic in nature, routinely engaged in fraudulent and deceptive acts and practices and courses of business in the sale of its life insurance policies;

b. whether NY Life had a duty of full disclosure to the policyholders and whether or not NY Life fulfilled its duty to the policyholders;

c. whether NY Life promoted the sale of life insurance as an investment, retirement, education or savings plan;

d. whether NY Life, through its compensation structure, policies and procedures encouraged "churning" or internal replacements of policies;

e. whether NY Life developed, encouraged and engaged in a scheme designed to sell new policies to existing policy owners through the fraudulent concealment of material facts;

f. whether NY Life failed to supervise and train its agents;

g. whether NY Life failed to review filed generated sales materials, so as to prevent its agents and representatives from fraudulently and improperly concealing the true nature of its life insurance policies by disguising the life insurance policies as vanishing premium policies, investment vehicles or savings plans;

h. whether NY Life engaged in deceptive acts and practices in the sale of its policies as "vanishing premium" policies by representing through policy illustrations, sales materials and uniform sales presentations approved and prepared by it that the single prepayment of premiums made by Class Members at the time of purchase, or a fixed

number of premiums paid during a fixed period of years, would be sufficient to carry the cost of the policies for the life of the insured;

i. whether NY Life concealed at the time of sale and thereafter the number of out-of-pocket premium payments a policy owner would have to pay and the cash values, surrender values and/or benefits (including lifetime income payable) a policy owner would realize based on a particular number of cash premium payments, or the nature of the product being sold;

j. whether NY Life, through its sales force, concealed from Class Members the dividends payable on its policies by failing to disclose that the dividends payable as illustrated in the uniform sales presentation and policy illustration approved and prepared by NY Life could decrease in future policy years;

k. whether NY Life failed to disclose to Class Members material information relating to the projections of future NY Life dividends;

l. whether the uniform sales presentations and/or policy illustrations presented to plaintiffs and Class Members contained false and misleading data relating to dividends, interest values, premiums, cash values, surrender values, death benefits, investment returns and income payable;

m. whether the dividend scales, values, assumptions, mortality experience, expenses, lapse rates, interest rate and investment return projections underlying NY Life's policy illustrations were so flawed as to have an adverse impact on Class Members;

n. whether the dividend scales, values, assumptions, mortality experience, expenses, interest

rate and investment return projections underlying defendant's policy and dividend illustrations were inconsistent with or contrary to NY Life's internal forecasts, business plans, estimates, analyses or projections concerning future interest rates and dividends; and

o. whether Article 22:1220 of the Louisiana Insurance Code is applicable to this case in that Plaintiffs are entitled to twice their actual damages.

6. Plaintiffs have submitted credible evidence that the claims of the representative parties are typical of the claims of the Class as a whole. The Court has reviewed the deposition testimony of the Class Representatives, considered the testimony of the experts and has considered the voluminous documentary evidence submitted and finds the claims of Class Representatives to be typical and representative of the Class Members. The Court finds there is not any conflicts of interest between the Class Representatives and the Class Members. After considering all of the evidence, the Court finds that the claims of those Class Members with lapsed policies are not in conflict with the claims of the Class Members who have in force policies.

7. Plaintiffs have submitted credible evidence that the Class Representatives and their attorneys will fairly and adequately protect the interests of the Class. The Court finds that the proposed class counsel are competent, skilled and experienced attorneys in complex litigation and class actions. The Court finds that proposed class counsel will aggressively pursue the Class Members claims.

8. Plaintiffs have submitted credible evidence that the prosecution of separate actions by individual Members of the Class would create a risk of inconsistent or varying adjudications which would establish incompatible standards of conduct on the part of the Defendant.

9. The Court finds that the questions of law and fact common to the Members of the Class predominate over any questions affecting only individual Members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. In making this finding, the Court considered the following matters:

a. the interest of Members of the Class in individually controlling the prosecution or defense of separate actions;

b. the extent and nature of any litigation concerning the controversy already commenced by or against Members of the Class;

c. the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

d. the difficulties likely to be encountered in the management of a class action.

B. Conclusion of Law

1. Plaintiffs' proposed Louisiana Class satisfies the requirements of La. C.C.P. Art. 591.

2. Plaintiffs' proposed Louisiana Class satisfies the requirements of La. C.C.P. Art. 592.

3. Plaintiffs' proposed notice program satisfies the due process rights of Class Members, the form of the proposed Notice is attached as Exhibit "A".

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion for Class Certification is hereby **GRANTED** and that a Louisiana Class with the following definition and conditions is hereby **CERTIFIED** under La. C.C.P. Art. 591, *et seq.*:

a. All persons who purchased whole or universal life policies from Defendant NY Life between January 1, 1982 through December 31, 1994 who opted out of the class action styled *Willson, et al v. New York Life Insurance Company, et al.*, filed in the Supreme Court of New York, and who resided in Louisiana at the time they opted out;

b. Excluded form [sic] the Class are all claims for personal injury by Class Members;

c. Also excluded from the Class are defendants; any parent, subsidiary, affiliate, or controlled person of any defendant; the officers, directors, agents, servants, or employees or any of the same; and the Members of the immediate families of any such person.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the following attorneys at their law firms are appointed class counsel: C. Jerome D'Aquila; Jules B. LeBlanc, III; Debra Brewer Hayes; Charles S. Lambert, Jr.; Randy J. Ungar; Charles B. Colvin; Robert Johnston; and Andres Christian Pereira.

THUS DONE AND SIGNED on this 18th day of November, 1996, in Plaquemine, Louisiana.

/s/ Jack T. Marionneaux
JUDGE JACK T. MARIONNEAUX

Exhibit "A"

*****

NOTICE OF CLASS DETERMINATION

ALL PERSONS WHO PURCHASED WHOLE OR UNIVERSAL LIFE POLICIES FROM DEFENDANT, THE NEW YORK LIFE INSURANCE COMPANY, FROM JANUARY 1, 1982, THROUGH DECEMBER 31, 1994, WHO OPTED OUT OF THE CLASS ACTION STYLED *WILLSON, ET AL. v. NEW YORK LIFE INSURANCE COMPANY, ET AL.*, FILED IN THE SUPREME COURT OF NEW YORK, AND RESIDED IN LOUISIANA AT THE TIME THEY OPTED OUT, SHOULD READ THIS NOTICE CAREFULLY BECAUSE IT AFFECTS YOUR RIGHTS AND MAY BE BINDING ON YOU IN THE FUTURE.

A lawsuit was begun in January, 1996, as a class action on behalf of all individuals who purchased whole or universal life policies from Defendant, The New York Life Insurance Company, from January 1, 1982, through December 31, 1994, who opted out of the class action styled *Willson, et al. v. New York Life Insurance Company, et al.*, filed in the Supreme Court of New York, and who resided in Louisiana at the time they opted out.

Excluded from the Class are all claims for personal injury by Class members; and Defendants; any parent, subsidiary, affiliate, or controlled person of any defendant; the officers, directors, agents, servants, or employees or any of the same; and the members of the immediate families of any such person.

The Petition for Damages and subsequent Supplemental and Amending Petitions allege that the Defendants committed unfair and deceptive acts in the selling of the relevant policies; that Defendants breached their

duty of good faith and fair dealing to the Class members; that Defendants engaged in fraud in the sale of the relevant policies; that The New York Life Insurance Company was negligent in the supervision of its agents; that the Defendants negligently and intentionally made misrepresentations and omissions in the sale of the relevant policies; and, that the Defendants breached their contracts with Class members. Plaintiffs have suffered harm in the form of economic loss for which they seek damages in this lawsuit.

Defendants have denied all the essential allegations of the class claim. The Court has not expressed any opinion on the merits of this claim.

This matter was certified as a class action by Court Order on November 18, 1996. The date of the Trial is December 26, 1996.

Everyone who purchased whole or universal life policies from Defendant, The New York Life Insurance Company, from January 1, 1982, through December 31, 1994, who opted out of the class action styled *Willson, et al. v. New York Life Insurance Company, et al.*, filed in the Supreme Court of New York, and resided in Louisiana at the time they opted out; excluding those who have claims for personal injury, and excluding Defendants; any parent, subsidiary, affiliate, or controlled person of any defendant; the officers, directors, agents, servants, or employees or any of the same; and the members of the immediate families of any such person; is a class member and will be bound by this lawsuit with respect to the class claim unless they specifically ask to be excluded. If a person wishes to be excluded as set forth in this Notice,

he or she will not be bound by the outcome of this action. Any class member who wishes exclusion from the class must request to be excluded in writing by sending a letter or by completing and mailing the attached form to the address listed on the form. This request for exclusion from the class must be postmarked no later than December 20, 1996, and need not state any reason for being excluded.

If you desire to be a member of the class, do nothing. You will be represented by the following counsel: C. Jerome D'Aquila, Jules B. LeBlanc, III, Debra Brewer Hayes, Charles S. Lambert, Jr., Andres Christian Pereira, Randy J. Ungar, Charles B. Colvin, Robert Johnston, and their law firms. Even if you do not request exclusion and thus continue as a member of the class, you have the right to appear in the class action and be represented by your own counsel. If Plaintiffs are successful on the class claim, all qualifying class members, who do not ask to be excluded, will share the benefit of any recovery. If Judgment is rendered in favor of the Defendants, class members will be denied any recovery.

If the Plaintiffs do not succeed in the class action, persons who did not exclude themselves from the class and who do not enter an appearance by their own attorneys will not be responsible for any of the costs of the litigation. If Plaintiffs' counsel are successful on the class claim, and recover a Judgment for the class, they will ask the Court to approve payment of their legal fees and expenses from the money received. If Plaintiffs' counsel negotiate a settlement of the class action, they will ask the Court to approve payment of their legal fees and expenses from the settlement fund. The Court must

approve the terms of any settlement, including any award of attorneys' fees and expenses, and the class must be given notice of and the opportunity to object to the terms of any such settlement.

Any inquiry you may wish to make concerning this Notice should be directed to the address listed in the Request for Exclusion From the Class Action form attached below. The Court files in this action are available for inspection during regular office hours at the Office of the Clerk of Court, 18th Judicial District Courthouse, East Main Street, New Roads, Louisiana.

November 18, 1996
New Roads, Louisiana

Honorable Jack T. Marionneaux
District Court Judge

REQUEST FOR EXCLUSION FROM
THE CLASS ACTION

TO: CLASS ACTION ADMINISTRATOR
ESSEN CENTRE
5353 ESSEN LANE, SUITE 420
BATON ROUGE, LA 70809

CHECK HERE IF YOU WISH TO BE EXCLUDED FROM THE CLASS ACTION [___]

SIGNATURE: _____

PRINT NAME: _____

STREET ADDRESS: _____

CITY: _____

APPENDIX E

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

HARRY W. WILLSON, *et al.*, Plaintiffs, -against- NEW YORK LIFE INSURANCE COMPANY and NEW YORK LIFE INSURANCE AND ANNUITY CORPORATION, Defendants.	IAS Commercial Part 14 Hon. Walter M. Schackman Index No. 94/127804

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER AND JUDGMENT

Plaintiffs and defendants have submitted for approval the proposed settlement of this class action which is memorialized in a Settlement Agreement dated July 28, 1995 and amended November 8, 1995 (the "Settlement Agreement"). The request for approval has been fully briefed and supported by affidavits and was the subject of a fairness hearing on November 15, 1995 at which time the Court heard counsel for the parties as well as those objecting to the proposed settlement. Following that hearing the Court allowed additional briefing until November 30, 1995 to enable objectors to further respond to the arguments and evidence put forth by the parties

and to allow the parties to respond to the objectors' submissions.

On the basis of all of these submissions the Court makes the following findings of fact and conclusions of law and issues its Final Order and Judgment approving the settlement and dismissing the Complaint with prejudice.

I. BACKGROUND.

A. The Complaint.

1. Named plaintiffs Irene and Robert Gillette commenced this litigation by filing a complaint against New York Life Insurance Company and New York Life Insurance and Annuity Corporation (collectively, "New York Life") on behalf of a putative nationwide class of New York Life policyowners on September 8, 1994. *Gillette v. New York Life Ins. Co.*, Index No. 94/125903 (Sup. Ct. N.Y. Co.). In subsequent months, additional plaintiffs seeking to represent nationwide classes of New York Life policyowners filed three more lawsuits: *Willson v. New York Life Ins. Co.*, Index No. 94/127804 (Sup. Ct. N.Y. Co.) (filed September 28, 1994); *Villamil v. New York Life Ins. Co.*, Index No. 95/112433 (Sup. Ct. N.Y. Co.) (filed May 16, 1995); and *Silva v. New York Life Ins. Co.*, Index No. 95/114850 (Sup. Ct. N.Y. Co.) (filed June 13, 1995). These lawsuits were consolidated by Order of this Court dated June 29, 1995, under the caption *Willson v. New York Life Ins. Co.*, Index No. 94/127804 (Sup. Ct. N.Y. Co.). In July 1995, plaintiffs served and filed a consolidated amended complaint (the "Complaint") that, among other things, added another named plaintiff, Raymond E. Ferry.

2. The Complaint is brought on behalf of a nationwide class of persons or entities (the "Class") who have or had an ownership interest in certain life insurance policies issued by New York Life between January 1, 1982 and December 31, 1994. The Class description is set forth in full in the accompanying Order and Final Judgment. The Complaint asserts claims based upon breach of contract, fraud, negligent misrepresentation, unjust enrichment, and New York's consumer protection statute, General Business Law § 349. It seeks (*i*) damages, including punitive damages, (*ii*) attachment, impounding or the imposition of a constructive trust upon New York Life's "ill-gotten funds," and (*iii*) attorneys' fees, costs and disbursements.

3. The Complaint sets forth numerous allegations. Its central claims are that (*i*) New York Life engaged in a nationwide scheme to induce Class Members to purchase life insurance policies based upon false or misleading sales presentations, policy illustrations, and other marketing or sales materials, and (*ii*) New York Life injured class members through its dividend and interest rate practices and its false or misleading representations about those practices. In particular, for example, the Complaint alleges that New York Life misled Class Members about its premium offset proposal ("POP"), the potential investment or savings aspects of its insurance products, and the costs and benefits of using some or all of the cash value of existing policies to purchase new policies.

B. The Parties.

4. The Class Representatives.

a. Plaintiff Harry W. Willson is a citizen and resident of Green Valley, Arizona. He is 78 years old. On or about September 5, 1985, Mr. Willson purchased a $24,500 whole life insurance policy from New York Life. He purchased the policy by surrendering an existing policy with a face amount of $10,000 that he had purchased in 1954, in order to obtain funds with which to pay premiums on the new policy. Mr. Willson alleges that New York Life's agent told him that the new policy was fully paid-up. However, Mr. Willson, who has since retired, received a premium notice for $1,956.83 in August 1993.

b. Irene and Robert Gillette are citizens and residents of Marana, Arizona. Mrs. Gillette is 50 years old and Mr. Gillette is 48 years old. On or about September 26, 1983, Mrs. Gillette purchased a $5,000 employee whole life insurance policy from New York Life, and Mr. Gillette, her husband, purchased a $15,000 employee whole life policy. The Gillettes allege that they were told that they would have to pay premiums on the policies for only eight years, after which, as a result of the premium offset proposal or "POP," their policies would be fully paid-up and they would not have to pay premiums. The Gillettes paid premiums on their policies until Mrs. Gillette left her job in September 1993. Upon learning that New York Life would require additional premium payments to keep their policies in force, they terminated their policies and received checks for the cash value of the policies, $790.80 and $2,143.27, respectively.

c. Raymond E. Ferry is a citizen and resident of Tucson, Arizona. He is 59 years old. On or about October 18, 1985, Mr. Ferry purchased two whole life insurance policies from New York Life, one for $10,000 and the other for $33,150. He purchased the $33,150 policy with the proceeds from his surrender of a policy with a face amount of $10,000. Mr. Ferry alleges that a New York Life agent told him that if he surrendered his old policy to make a single premium payment on his new policy, the policy would be fully paid-up with no more premiums due. He also alleges that he was told that if he paid premiums on the new $10,000 policy every year for ten years, the policy would become fully paid-up. Mr. Ferry received a premium notice for the $33,150 policy in September 1994, and continues to owe premiums on the $10,000 policy. Mr. Ferry, who alleges that he is now uninsurable and that he plans to retire soon, has continued to pay premiums on both policies, either in cash or through premium loans.

d. Plaintiff Martha Villamil is a citizen and resident of Stamford, Connecticut. On or about June 22, 1993, Ms. Villamil purchased a universal life insurance policy for $100,000 from New York Life Insurance and Annuity Corporation ("NYLIAC"). Ms. Villamil, who is 41 years old and is the mother of two young children, alleges that she told New York Life's agent that she wished to invest $100,000 for her children's education in a risk-free investment. She was issued a universal life insurance policy with a death benefit of $670,610. The policy was alleged in the Complaint to be a Modified Endowment Contract, with negative tax consequences.

e. Plaintiffs Manuel and Fatima Silva are citizens and residents of Monroe, Connecticut.[1] The Silvas purchased from New York Life a $50,000 whole life policy on Manuel Silva that was issued on December 19, 1985 and a $50,000 policy insuring the life of Fatima Silva that was issued on February 25, 1986. The Silvas allege that New York Life's agent told them that the policies would be fully paid-up in just four years, with no further premiums due after that time. In 1989, the Silvas bought four additional whole life insurance policies, two in the amount of $50,000 each on Manuel's life and two $50,000 policies on Fatima's life. (The Silvas allege that they agreed only to purchase two, not four, policies at that time.) Again, the Silvas allege that New York Life's agent told them that the new policies would be fully paid-up in four years. The premium payments made by the Silvas were insufficient to sustain all six policies. Several policies have lapsed and others have been charged with premium loans to pay the premiums due.

5. ***Class Counsel.*** The plaintiffs and the Class are represented by Melvyn I. Weiss of the law firm Milberg Weiss Bershad Hynes & Lerach ("Lead Counsel"); Ron Parry of Arnzen, Parry & Wentz, P.S.C. ("Co-Lead Counsel" with respect to certain issues); Andrew Friedman of Bonnett, Fairbourn, Friedman & Balint, P.C.; Eric Slocum Sparks of Law Offices of Eric Slocum Sparks, P.C.; Steven Hubbard of Cantilo, Maisel & Hubbard; Laurence Goldfein, Esq.; W. Christian Hoyer of James, Hoyer & Newcomer; and Jared Stamell of Stamell, Tabacco & Schager,

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[1] *See* footnotes 4 and 5 for discussion of Ms. Silva's status as representative plaintiff.

L.L.P. All are experienced plaintiffs' class action counsel with expertise in insurance law.

6. ***Defendants***. Defendant New York Life Insurance Company is a mutual insurance company organized under the laws of the State of New York. Defendant New York Life Insurance and Annuity Corporation, a wholly-owned subsidiary of New York Life Insurance Company, is a corporation organized under the laws of the State of Delaware. New York Life Insurance Company and NYLIAC are represented by New York Life's Office of General Counsel and by their outside attorneys, Debevoise & Plimpton.

C. **History of the Litigation.**

7. Defendants served motions to dismiss the *Gillette* and *Willson* complaints in their entirety on October 28, 1994. On December 1, 1994, they moved to consolidate the cases and have them assigned to commercial part. Plaintiffs consented to consolidation and assignment to commercial part. Plaintiffs served papers in opposition to the motion to dismiss on December 2, and, on the same day, cross-moved for an order preventing defendants from communicating with absent class members. The cases were consolidated under the *Willson* caption by order of this Court dated December 21, 1994. Also on December 21, defendants served reply papers in support of their motions to dismiss, and made a supplemental motion to dismiss the *Willson* complaint. Defendants responded to plaintiffs' cross-motion on December 30. On January 4, 1995, plaintiffs (*i*) served reply papers in support of the cross-motion and (*ii*) responded to defendants'

supplemental motion to dismiss. The motions were fully briefed as of January 6, when defendants served reply papers in support of their supplemental motion to dismiss, and were submitted to the Court at or about that time.

8. In the meantime, the parties began considering settlement. Plaintiffs rejected defendants' initial proposal, but agreed to discuss settlement options. Preliminary discussions ensued, and intensive negotiations began in January and continued through February 1995. In mid-February the parties' counsel signed a Memorandum of Understanding (the "MOU") setting forth a framework through which to explore settlement that counsel were prepared to recommend to their clients.

9. Before they signed the MOU, plaintiffs' counsel received informal discovery from New York Life with respect to their claims, including a meeting between their actuarial expert and senior New York Life actuaries. Plaintiffs also consulted outside experts and independently gathered information from industry sources and from insurance agents. In addition, the framework for exploring settlement to which counsel for plaintiffs and New York Life agreed in February 1995 contemplated extensive discovery to allow plaintiffs to evaluate their chances for success in the litigation and to assess the fairness, reasonableness and adequacy of the proposed settlement.

10. The parties met with the Court on March 9, 1995 to inform the Court that they were exploring settlement and to explain the key features of the settlement under discussion and their plans for discovery. After hearing

counsel, the Court issued an order dated March 9, 1995 which preliminarily certified the Class for settlement purposes only and designated Class representatives and lead counsel for the Class. The order also adjourned the pending motions without date.

11. Shortly after the entry of Court's March Order, the parties entered into a Stipulation of Confidentiality, and extensive discovery ensued, including document production and depositions.

12. In May and June 1995, while the parties to *Gillette* and *Willson* were engaged in discovery, the *Villamil* and *Silva* complaints were filed. Like the *Gillette* and *Willson* complaints, the new complaints also alleged that New York Life used improper and misleading sales practices to sell various life insurance policies. Settlement negotiations began with counsel for the plaintiffs in those actions almost immediately. After nearly a month of negotiations, counsel for the parties in all four actions agreed on a comprehensive settlement framework and executed an Addendum to the previous MOU. The Addendum contemplated additional discovery to allow the new plaintiffs to evaluate their chances for success in the litigation and to assess the fairness, reasonableness and adequacy of the proposed settlement.

13. In late June 1995, counsel for all of the parties to *Gillette*, *Willson*, *Villamil* and *Silva* met with the Court to apprise it of the status of settlement negotiations. The Court issued an Order, dated June 29, 1995, consolidating the actions under the *Willson* caption.

14. Between March 10, 1995 and July 28, 1995, New York Life produced for plaintiffs' review approximately

420,000 pages of documents, 148 computer disks, 33 videotapes and 17 audiotapes. These materials, which included documents generated by agents and local New York Life managers as well as its Home Office personnel, were gathered in response to discovery requests from plaintiffs' counsel and came from various departments within New York Life's Home Office and from its five regional zone offices, as well as from the files of the deponents. Plaintiffs deposed 14 current and former senior executives and agents of New York Life. The deponents included the Vice Chairman of New York Life, who is a member of the Board of Directors; a former board member; members of senior management, including officials responsible for financial and actuarial matters, compliance, individual life, sales and training; and several current or former regional managers, general managers and agents.

15. On July 31, 1995, this Court signed an Order (the "July Order") that, among other things, (*i*) certified for settlement purposes only the Class described in the Complaint; (*ii*) found that the Settlement Agreement was sufficient to warrant giving notice to Class Members and scheduling a full hearing on the proposed settlement; (*iii*) directed the forms and methods of notice; (*iv*) approved the appointment of Boston Financial Data Services, Inc. ("BFDS") as Class Action Administrator; and (*v*) set forth procedures whereby Class Members could exclude themselves from the Class or object to the terms of the proposed settlement.

D. The Fairness Hearing.

16. On November 15, 1995, the Court held a hearing to consider the fairness, reasonableness and adequacy of the proposed settlement, which the parties had fully briefed.

17. The Court considered the objections of the Class Members who objected to the settlement or the attorneys' fees request, including those who appeared *pro se* or through counsel at the hearing. Those who appeared at the hearing were: (*i*) Milton Bernard Clarke; (*ii*) Lawrence Schonbrun, Esq. on behalf of Ron and Silva Demirdjian; (*iii*) Roger Kirby, Esq. of Kaufman, Malchman, Kirby & Squire on behalf of Edith R. and Eugene Halpert; (*iv*) Nazeih R. Hammouri; (*v*) Stuart Levy on behalf of himself and his wife Susan Levy; (*vi*) Beverly Moore, Esq., of Moore & Brown, representing Harold G. Mercer, and Harold Mercer *pro se;* (*vii*) Fatima Silva; and (*viii*) Debra Hayes, Esq. of Fleming, Hovenkamp & Grayson, representing Leon Zoller.

18. The Court also considered the testimony submitted by plaintiffs through affidavits in support of the settlement from (*i*) Arlin M. Adams, former judge of the United States Court of Appeals for the Third Circuit; (*ii*) Richard D. Baum, former Chief Deputy Insurance Commissioner for the California Department of Insurance; (*iii*) Judy A. Faucett of Coopers & Lybrand, L.L.P.; (*iv*) Melvin L. Gold, FSA; (*v*) James L. Mitchell, Esq. of the Law Offices of Fred Misko, Jr., P.C.; (*vi*) Dean John E. Sexton, Esq. of the New York University School of Law; (*vii*) Howard A. Specter, Esq.; (*viii*) Melvyn I. Weiss, Esq., Alan M. Mansfield, Esq. and Brad N. Friedman, Esq. of Lead

Counsel Milberg Weiss Bershad Hynes & Lerach; and (*ix*) all of the affidavits submitted by Lead Counsel, Co-Lead Counsel and other counsel in the "Law Firm Affidavits in Support of Joint Petition For Attorneys' Fees and Expenses;" an affirmation by Melvyn Weiss, and a supplemental affidavit from Barry Weprin, Esq., of Milberg Weiss Bershad Hynes & Lerach. The Court also considered affidavits submitted by defendants from (*i*) Daniel McCarthy and Dale Hagstrom of Milliman & Robertson; (*ii*) Professor David F. Babbel of the Wharton School (sworn to on November 10, 1995); (*iii*) Professor David F. Babbel of the Wharton School (sworn to on November 14, 1995); (*iv*) Professor John C. Coffee, Jr., of the Columbia Law School; (*v*) James F. Henry, president of CPR Legal Program; (*vi*) Michael T. Jones, Vice President of BFDS, the Class Action Administrator; (*vii*) Stacey Lippman of Chiat-Day; and (*viii*) Susie Brown, Solomon Goldfinger, Robert J. Hebron, Esq., Edward J. Kaminski, Grace McMahon, John O'Byrne, Paul Russell and Richard Taigue, Esq. of New York Life; a supplemental affidavit from John O'Byrne; supplemental affidavits from Dale S. Hagstrom and Daniel McCarthy of Milliman & Robertson and a second supplemental affidavit from Dale S. Hagstrom; supplemental affidavits from Michael T. Jones and Randall E. Torres of BFDS and a second supplemental affidavit from Michael T. Jones; a supplemental and second supplemental affidavit from Robert J. Hebron of New York Life; and an affirmation, supplemental affirmation and second supplemental affirmation from Donald Francis Donovan, Esq., of Debevoise & Plimpton.

19. The Court has also considered the reaction of various state insurance departments to the proposed

settlement. *See* Hebron Aff. ¶¶ 42-48. In particular, the Court has considered a letter dated November 10, 1995 to Robert C. Meade, the Court's Law Secretary, from Gregory V. Serio, First Deputy Superintendent and General Counsel of the New York State Insurance Department, which states, in relevant part:

> In the view of the Department, the settlement is a fair and innovative plan to address the various concerns of the classes of policyowners involved, while avoiding the uncertainties, delays and costs associated with protracted litigation.
>
> We urge Justice Schackman to approve the proposed settlement as we believe it fairly and equitably addresses the interests and concerns of the plaintiffs. We believe further that it also contributes to the larger policy objective of addressing and reforming a number of sales practice issues that have become a matter of some concern to regulators throughout the United States.

E. The Proposed Settlement.

20. The proposed settlement provides a two-tier approach intended by the parties to make appropriate relief available to every Class Member. Any Class Member may submit a claim to the individual Alternative Dispute Resolution Process (the "ADR Process"), where the claim will, if the Class Member chooses, be heard by an independent arbitrator. Class Members who choose not to participate in the ADR Process will be eligible for one or more of three possible forms of Class Relief, which

require no showing on the part of the Class Member except as to eligibility under the Settlement Agreement: Optional Premium Loans, Enhanced Value Policies or Enhanced Value Annuities. In addition, pursuant to the proposed settlement, for a 12-year period beginning in 1996, New York Life management will present to the Board of Directors information summarizing the effect that any proposed reduction in dividend scales for individual life policies would have on policyowners' ability to use the premium offset proposal to pay policy premiums as they become due. The Board will, however, retain its discretion under the law to determine divisible surplus and allocate dividends.

21. ***The ADR Process.*** Any Class Member can bring a misrepresentation or other claim against New York Life through the individual ADR Process. In the ADR Process, Class Members submit claim forms with respect to their individual claims. The agent who sold the policy will be asked to provide a corresponding statement. New York Life will also provide its files relating to the policyowner's claim to the claim-review team. To help ensure that claims are fairly evaluated and that the correct forms of relief are awarded, a Policyowner Representative selected by Lead Counsel and compensated by New York Life will participate as the Class Members' advocate in the claim review and other aspects of the ADR Process.

22. Initially the claims will be reviewed and scored by a claim-review team appointed by New York Life. Class Members who are dissatisfied with the claim-review team's disposition of their claim may have their claim reviewed, *de novo*, by an independent arbitrator, at

New York Life's expense. The arbitration will be conducted by an arbitrator randomly appointed from one of ten regional panels of neutrals chosen by plaintiffs' counsel from a list prepared by the American Arbitration Association ("AAA") and approved by the parties. A Class Member who pursues arbitration will have the right to appear at the proceedings, either in person, by telephone, or through an attorney retained at the Class Member's expense. New York Life may appear only through the method chosen by the Class Member.

23. If the Policyowner Representative, after reviewing the initial award, believes that the arbitrator's decision with respect to a claim constitutes a "manifest injustice," the Representative may seek rehearing from the arbitration panel.

24. Both the claim-review teams and the arbitrators will evaluate claims using procedures, including detailed substantive evaluation and relief criteria, agreed to by plaintiffs and New York Life and set forth in the Settlement Agreement and in Exhibits A and B to the Agreement. The relief available through the ADR Process varies depending on the type of claim and the level of proof supporting it. The various types of relief are designed to provide comprehensive compensation that addresses the type of claim and the harm associated with it. Punitive or exemplary damages may not be awarded. There is no cap on the aggregate relief for which New York Life may be liable by way of awards pursuant to the ADR Process.

25. The ADR Process is not restricted to claims expressly alleged in the Complaint. Rather, so long as they comply with the ADR Process requirements, Class

Members may submit to the ADR Process all claims with respect to the policies included in the Class definition, regardless of whether the claims are specifically described within the four corners of the Complaint. In addition, the proposed settlement provides that New York Life may require Class Members to resolve through the ADR Process certain claims not submitted to the Process.

26. ***Class Relief.*** In addition to the ADR Process, the proposed settlement makes three types of "no-fault" relief available to Class Members. Every Class Member who does not choose to submit his or her claim to ADR may choose at least one of these options. Class Members need not show fault, injury or damages to be entitled to the no-fault Class Relief.

a. *Optional Premium Loans* ("OPLs") are loans available to Class Members with in-force whole life policies. The loans will have a variable interest rate, adjusted quarterly, equal to New York Life's short-term unsecured borrowing cost plus an amount not to exceed 50 basis points to cover the costs of administering the loans. Depending on relevant factors such as on their policy's issue date, Class Members may apply for one to six OPLs as their premiums become due through December 31, 2007.

b. *Enhanced Value Policies* ("EVPs") are available to Class Members whose policies have been terminated or are heavily-loaned, and to Class Members who own universal life policies. The EVP is the new whole life or universal life insurance policy that most closely resembles the Class Member's terminated or existing policy,

although its face amount may be less than the original policy at the Class Member's option. The policy will be "enhanced" by a cash contribution, to be paid into the policy by New York Life, equal to one-half of the policy's first-year annual policy premium (for a whole life product) or one-half of the target premium (for a universal life product). Class Members will be required to submit evidence of insurability for EVPs, but New York Life will use the liberalized underwriting requirements set forth in Exhibit K to the Settlement Agreement in connection with their applications.

c. *Enhanced Value Annuities* ("EVAs") are available to Class Members who do not choose EVPs, or who do not meet the eligibility or underwriting requirements for EVPs. The EVA is a currently issued, non-qualified single premium deferred annuity that features (*i*) a $2,500 minimum initial premium and a variable maximum initial premium (depending on the face amount of the Class Member's policy), (*ii*) a reduced first-year commission, and (*iii*) liberalized surrender charges for EVA purchasers who are older than 51½. The guidelines for maximum EVA premiums are set forth at page 28 of the Settlement Agreement. New York Life will "enhance" each EVA by making a cash contribution to the annuity equal to two or three percent of the initial premium, depending on the amount of that premium.

27. The parties designed each of the three forms of Class Relief to respond to the particular circumstances of Class Members who did not have ADR claims or did not wish to participate in the ADR Process. Optional Premium Loans are intended to meet the needs of Class Members who, because of reduced dividends or the

replacement of previous policies, must pay premiums out-of-pocket for longer than they may have planned when they purchased their policies. Enhanced Value Policies are intended to meet the needs of those whose policies terminated, or became heavily loaned, or whose policies have not increased in value at the rate that the policyowner originally anticipated because of reduced dividend scales or interest-crediting rates. And Enhanced Value Annuities are intended to meet the needs of those who now wish assistance in meeting an investment or savings goal.

28. In exchange for these settlement benefits, the Settlement Agreement releases New York Life from all claims covered by the release, which is set forth in full in the Settlement Agreement at Section H, page 56.

II. CLASS CERTIFICATION.

29. The Court has considered the class action prerequisites set forth in CPLR 901 as well as the factors set forth in CPLR 902 and makes the following findings regarding class certification.[2] In doing so, the Court recognizes that it is making findings in the context of an action that is being settled.

a. ***Numerosity***. The numerosity requirement of CPLR 901 is plainly satisfied. The Class consists of

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[2] Because CPLR Article 9 is similar to Rule 23, it is appropriate to look to federal precedent in interpreting New York's class action statute. *Colt Indus. Shareholder Litig. v. Colt Indus., Inc.*, 77 N.Y.2d 185, 194, 566 N.E.2d 1160, 1165, 565 N.Y.S.2d 755, 760 (1991).

approximately three million purchasers of New York Life policies and the Class Members are therefore clearly so numerous that joinder of all members is impracticable. *E.g., Branch v. Crabtree*, 197 A.D.2d 557, 557, 603 N.Y.S.2d 490, 490 (2d Dep't 1993) (class of over 5000 sufficiently numerous to warrant certification); *Pruitt v. Rockefeller Center Properties, Inc.*, 167 A.D.2d 14, 21, 574 N.Y.S.2d 672, 676 (1st Dep't 1991) (class of thousands is sufficiently numerous); *see also Consolidated Rail Corp. v. Hyde Park*, 41 F.3d 473, 483 (2d Cir.) (numerosity satisfied where at least 300 class members), *cert. denied*, 115 S. Ct. 2277 (1995).

b. ***Commonality and Predominance.*** (i) Commonality requires that there be a factual or legal issue common to all or a substantial portion of class members. *See Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986); 3B James W. Moore, et al., *Moore's Federal Practice* ¶ 23-06-1 (2d ed. 1993).

(ii) In deciding whether common questions predominate, the Court considers "whether the proposed class members are more bound together by a mutual interest in the adjudication of common questions than they are divided by the individual members' interest in matters peculiar to them." 2 J. B. Weinstein, et al., *New York Civil Practice* ¶ 901.11 (1995). Application of this rule to this case is complex. There are clearly important issues of law and fact common to the Class, including questions as to whether New York Life engaged in a nationwide scheme regarding (*i*) dividend and interest crediting rate practices and determinations or (*ii*) sales and illustration practices, and training and supervision with respect to those practices. The Court finds that these common issues of law and fact predominate in light of the ADR Process

included in the settlement, which provides interested Class Members the opportunity for individual adjudication of any individual factual and legal issues such as reliance, causation and damages.

c. *Typicality*. (i) "The 'typicality' requirement focuses . . . on the similarity of the legal and remedial theories behind [the named and unnamed plaintiffs'] claims." *Jenkins*, 782 F.2d at 472 (citations omitted). When plaintiffs' claims derive from the same practice or course of conduct that gave rise to the claims of other class members and are based on the same legal theory, the requirements of CPLR 901(a)(3) are satisfied. *Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 99, 434 N.Y.S.2d 698, 708 (2d Dep't 1980). It is not necessary that the named plaintiffs' claims be identical to the claims of all other class members in every respect; rather, there must be substantial similarity. *Branch*, 197 A.D.2d at 557, 603 N.Y.S.2d at 491; *Pruitt*, 167 A.D.2d at 22-23, 574 N.Y.S.2d at 676-77; *Weinberg v. Hertz Corp.*, 116 A.D.2d 1, 7, 499 N.Y.S.2d 693, 697 (1st Dep't 1986), *affd*, 69 N.Y.2d 979, 509 N.E.2d 347, 516 N.Y.S.2d 652 (1987); *Klurfeld v. Equity Enters., Inc.*, 79 A.D.2d 124, 131-32, 436 N.Y.S.2d 303, 307-08 (2d Dep't 1981).

(ii) Here, as discussed more fully under adequacy of representation, the legal and remedial theories of the named plaintiffs are typical of the theories of the Class. All Class Members' claims arise from New York Life's allegedly misleading and improper sales, illustration and dividend and interest rate practices, and all Class Members' remedial theories are similar.

d. ***Adequacy of Representation***. The requirement that "the representative parties will fairly and adequately protect the interest of the class" has been interpreted as having two primary components: (*i*) the qualifications of counsel, and (*ii*) the relationship between the interests of the class representatives and the interests of other class members. *See, e.g., Pruitt*, 167 A.D.2d at 24, 574 N.Y.S.2d at 678; *Hoxworth v. Blinder. Robinson & Co., Inc.*, 980 F.2d 912, 923 (3d Cir. 1992); *Jenkins*, 782 F.2d at 472; *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505, 524 (E.D. Tex. 1995).

(i) ***Qualifications of Counsel.*** Where a class is represented by competent and zealous counsel, this aspect of the adequate representation factor is satisfied. *Pruitt*, 167 A.D.2d at 24, 574 N.Y.S.2d at 678; *Ahearn*, 162 F.R.D. at 524. Here, Class counsel are competent, skilled and experienced plaintiffs' attorneys. They have successfully represented individuals and classes in numerous actions, including insurance sales practice cases, some of which they have litigated to judgment and others which they have settled. Before signing the Settlement Agreement, counsel insisted on conducting vast amounts of discovery, including inspection of more than 400,000 pages of documents, and on taking the depositions of 14 individuals including the Vice Chairman, top financial, actuarial and management officials of New York Life, and local managers and agents. Counsel kept the Court apprised of the status of settlement negotiations as they progressed, through conferences on March 9, June 29 and a hearing on July 31. The proposed settlement continued to improve throughout these negotiations. The Court is fully satisfied that the Class is

adequately represented by counsel for plaintiffs and the Class.

(ii) ***Relationship Between the Interests of the Class Representatives and the Interests of Other Class Members.*** Class representatives adequately represent the class provided that they have a sufficient stake in the outcome of the litigation and do not have interests antagonistic to those of the class. See *Jenkins*, 782 F.2d at 472; *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 317 (E.D. Pa. 1994) ("The key question is whether their interests are antagonistic" (citations omitted)). The representative plaintiffs in this action satisfy these requirements. Each has a stake in the outcome of the litigation.[3] In addition, no representative plaintiff has interests antagonistic to those of the Class. Indeed, the Court finds that between them, the Class representatives possess all of the relevant characteristics that Class Members share in varying degree.[4] Thus, far from having interests antagonistic to the Class, the representative plaintiffs represent a mix of

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[3] The Court notes that in response to plaintiff Harry Willson's answer to New York Life's motion to dismiss, New York Life unilaterally provided Mr. Willson with a policy on which he will be required to make no further out-of-pocket premium payments. Mr. Willson advised New York Life that he was not satisfied and continued to press his claims. Mr. Willson therefore retains a stake in the litigation.

[4] The Court finds that, even if the alleged claims arising from matters outside the scope of the lawsuit of representative plaintiff Fatima Silva render her inadequate or atypical or implicate interests antagonistic to those of the Class, the remaining representatives fully reflect and adequately represent the interests of the Class.

characteristics representative of the mix found in the Class itself. *See, e. g., Ahearn,* 162 F.R.D. at 525.

(iii) The innovative settlement provided here further supports a finding that the Class representatives adequately represent the Class. *See, White v. NFL,* 41 F.3d 402, 408 (8th Cir. 1994) ("The adequacy of the class representation . . . is ultimately determined by the settlement itself. R), *cert. denied,* 115 S. Ct. 2569 (1995); *In re Corrugated Container Antitrust Litig.,* 643 F.2d 195, 212 (5th Cir. 1981). And the combination of the individualized ADR Process and the no-fault Class Relief benefits accommodates much better than class actions are usually able to any variations between Class Members. The Court therefore finds that the Class representatives adequately represent the Class.

e. ***Superiority***. CPLR 901(a)(5) requires a finding that a class action is "superior to other available methods for the fair and efficient adjudication of the controversy." The large number of Class Members and the relatively small amount of some of their claims support this factor, *see, e.g., Gilman v. Merrill Lynch, Pierce. Fenner & Smith,* 93 Misc. 2d 941, 947-48, 404 N.Y.S.2d 258, 264 (Sup. Ct. N.Y. Co. 1978), and the proposed settlement's terms, particularly its individual ADR Process, obviate any concern about the need for individual determinations. The Court finds that, given the proposed settlement, a class action is clearly superior to other methods for the fair and efficient adjudication of this controversy.

30. In deciding whether to certify this settlement Class, the Court has also considered, among other factors,

(i) the interest of Class Members in individually controlling the prosecution or defense of separate actions; (ii) the impracticability or inefficiency of prosecuting or defending separate actions; (iii) the extent and nature of any litigation concerning the controversy already commenced by or against Class Members; (iv) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (v) the difficulties likely to be encountered in the management of a class action. *See* CPLR 902; Taigue Aff. ¶¶6-9.

31. Given the settlement, and specifically its Alternative Dispute Resolution component, the Court finds that the requirements of CPLR 901 and 902 are satisfied by this settlement Class and therefore finally certifies the settlement Class. *See, Colt Indus. Shareholders Litig.*, 77 N.Y.2d at 99, 566 N.E.2d at 1168, 565 N.Y.S.2d at 763 (affirming as modified order affirming certification of settlement class); *Klurfeld*, 79 A.D.2d at 133, 436 N.Y.S.2d at 308 (settlement class).

III. NOTICE AND JURISDICTION.

32. In the July Order this Court preliminarily approved the individual and publication notice to be given to the certified settlement Class.

33. The individual notice described in plain English the lawsuit, the settlement and the options available to Class Members. The notice included (*i*) the caption; (*ii*) a description of the litigation; (*iii*) a description of the settlement Class; (*iv*) identification of counsel for the Class; (*v*) a description of the proposed settlement,

including the relief available and the release to be given New York Life; (*vi*) the hearing date; (*vii*) information about the option to enter an appearance either individually or through counsel; (*viii*) the procedure and deadline for filing objections; (*ix*) the procedure and deadline for filing requests for exclusion; (*x*) the consequences of exclusion; (*xi*) the consequences of remaining in the settlement Class; (*xii*) a description of New York Life's responsibility for plaintiffs' attorneys' fees and expenses and of its agreement to pay attorneys' fees awarded by the Court up to a maximum of $22 million; (*xiii*) a description of the preliminary injunction issued by the Court; and (*xiv*) the procedure for obtaining additional information, including the 800 number established to respond to Class Member inquiries.

34. In addition to the formal notice, the notice package sent to each Class Member included a cover letter, an eight-page question-and-answer brochure and a statement of eligibility. The notices were customized to include the Class Member's name and address and to list the affected policies and the specific relief available to the Class Member with respect to each policy.

35. The publication notice, which was also written in plain English, included (*i*) the caption; (*ii*) a description of the settlement Class; (*iii*) a brief description of the settlement; (*iv*) identification of counsel for the Class; (*v*) the hearing date; (*vi*) information about the option of appearing at the hearing; (*vii*) information about and the deadline for filing objections to the settlement; (*viii*) information about and the deadline for filing requests for exclusion; (*ix*) the consequences of exclusion; (*x*) the consequences of remaining in the settlement Class; (*xi*) a

description of the preliminary injunction issued by the Court; and (*xii*) the procedure for obtaining further information, including a copy of the settlement notice.

36. The July Order required that individual notice be sent, by first-class mail, postage prepaid at New York Life's expense no later than 60 days before the Settlement Hearing, to the last known addresses of all persons who, according to New York Life's records, had an ownership interest in one or more policies during the Class Period. Pursuant to the Order, individual notice was sent to 2,964,275 Class Members by Output Technologies, Inc., under the supervision of Boston Financial Data Services ("BFDS"), the Class Action Administrator appointed by the parties and approved by the Court. Jones Aff. ¶ 10. The notices were sent in mailings on August 17, 24 and 31 and September 7 and 15. *Id.* ¶ 9. In addition, BFDS mailed 496 additional notices to Class Members who identified themselves as such through phone calls to the policyowner hotline. *Id.* ¶¶ 14, 16, 17.

37. Of the approximately three million individual notices mailed, 443,169 were returned as undeliverable. Approximately 23,034 of the returned notices contained forwarding addresses. In accord with the Order, BFDS remailed notices to these addresses. *Id.* ¶¶ 11, 13.

38. The July Order further provided that the summary notice be published at New York Life's expense, in the national editions of *The New York Times* (business section), *The Wall Street Journal* and *USA Today* no later than 50 days before the Settlement Hearing. Pursuant to that Order, New York Life published the summary notice in the national edition of *The New York Times, The Wall*

Street Journal and *USA Today* on September 22 and the national edition of *The New York Times* (business section) on September 25. In addition, although not required by the Order, the notices were published on either September 25, 26, 27 or 29 in the daily newspaper with the largest circulation in each state and in the District of Columbia, and in each of the daily newspapers with the top 20 circulations nationwide. In all, the notice was published in 59 newspapers with a combined total circulation of more than 22 million. Lippman Aff. ¶¶ 4-7.

39. The settlement also received extensive press coverage, including articles and columns in *The New York Times, The Washington Post, The Wall Street Journal* and in many state, local and trade newspapers nationwide. Nearly 200 articles or columns concerning the settlement were published in newspapers around the country. Hebron Aff. ¶ 49. This extensive press coverage provided additional, informal notice to Class Members. *See, e.g., In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 169 (2d Cir. 1987) (taking judicial notice of widespread publicity in considering adequacy of notice), *cert. denied*, 484 U.S. 1004 (1988).

40. The dates on which the individual notices were mailed and the summary notice published meant that most Class Members had ample opportunity approximately six to eight weeks – to consider their options before the October 31 deadline for exclusion requests and objections. *See Cannon v. Equitable Life Assurance Soc'y of the U.S.*, 106 Misc. 2d 1060, 1073-74, 433 N.Y.S.2d 378, 388 (Sup. Ct. Queens Co. 1980) (20 days sufficient time to request exclusion), *vacated on other grounds*, 87 A.D.2d 403, 451 N.Y.S.2d 817 (2d Dep't 1982).

41. As of December 11, 1995, 5,952 Class Members had excluded themselves with respect to one or more policies in accordance with the July Order. *See* Jones Second Supp. Aff. ¶¶ 6-8, 11 and Ex. E. The Court finds that the individuals and entities listed on Exhibit E to the Second Supplemental Jones Affidavit are excluded from the Class and are not bound by this or any prior orders of the Court in this action.

42. The Court draws no inference that those who excluded themselves from the Class did so because of dissatisfaction with the settlement. *See* Russell Aff. ¶¶ 8-9. Of the 3,594 requests for exclusion analyzed by September 29, 1995, 86.4% gave no reason for their exclusion; only 8.2% expressed dissatisfaction with their policy, agent, New York Life, or the proposed settlement. Russell Aff. ¶ 5. A survey conducted under the supervision of New York Life of the 3,105 opt-outs who provided no reason for their exclusion request reached 1,578 opt-outs. The survey found that only 8.3% of these opt-outs excluded themselves because they were angry at New York Life or dissatisfied with the proposed settlement. Russell Aff. ¶¶ 5-9.

43. Not including exclusion requests, a total of 444 written communications were served upon counsel and/or filed with the Court in compliance with, or in an apparent attempt to comply with, the procedures described in the Class Notice authorized by this Court in its Order of July 31, 1995. Of these communications, 344, on behalf of 512 Class Members, can be categorized as objections; a further 85 are complaints; and there are also 29 inquiries or expressions of interest in the proposed settlement.

44. The Class Action Administrator has received nearly 100,000 telephone inquiries on the 800 number provided for policyowners and nearly 3,000 calls on its line from agents. Jones Aff. ¶ 25. In addition, many Class Members have submitted written requests for information, or called plaintiffs' counsel directly.

45. The individual and publication notice provided to Class Members before the Settlement Hearing provided all information material to making an informed and intelligent decision whether to participate in the settlement Class and the settlement. The notice was reasonably calculated, under all the circumstances, to apprise Class Members of the pendency of this action, the issues before the parties, the terms of the proposed settlement and the options available to Class Members, including their right to object to the proposed settlement or to exclude themselves from the settlement Class and their right to appear at the Settlement Hearing. *See In re Colt Indus. Shareholder Litig.*, 155 A.D.2d 154, 160-61, 553 N.Y.S.2d 138, 142 (1st Dep't 1990), *aff'd as modified on other grounds*, 77 N.Y.2d 185, 566 N.E.2d 1160, 565 N.Y.S.2d 755 (1991); *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983).

46. Neither the CPLR nor the requirements of due process require actual notice to each and every possible class member. *See Colt Indus. Shareholder Litig.*, 155 A.D.2d at 157, 160, 553 N.Y.S.2d at 140, 142 (approving notice by publication in two newspapers); *Agent Orange*, 818 F.2d at 168; *Weinberger*, 698 F.2d at 71. Many members of this Class could not be located through reasonable effort. Supplementing individual notice with publication notice represents an appropriate balance between protecting

Class Members and making class actions workable. *See, e.g., Weinberger,* 698 F.2d at 69, 71 (mailed notice supplemented with published notice in just one paper).

47. The Court finds that the combination of individual and publication notice in this action was the most effective and best notice practicable under all the circumstances and constituted due, adequate and reasonable notice to all Class Members. The notice satisfied the requirements of due process, CPLR 904 and 908, and the Rules of this Court.

48. The Court further finds that the Post-Settlement Notice, the Post-Settlement Summary Notice, the Election Forms, the ADR Claim Form and the Post-Settlement Notice methodology set forth in the Settlement Agreement are together reasonably calculated, under all the circumstances, to apprise settlement Class Members of their rights pursuant to the settlement, constitute due, adequate and reasonable notice to all Class Members, and otherwise satisfy the requirements of due process, CPLR 904 and 908, and the Rules of this Court.

49. ***Personal Jurisdiction.*** Given the centrality of New York to the regulation of the defendants' operations, including the sale of the life insurance contracts involved in this case, this Court has personal jurisdiction over all Class Members. In any event, all Class Members have been afforded the best practicable notice under all of the circumstances and an opportunity to be excluded from the Class. *See Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812 (1985); *Colt Indus. Shareholder Litig.,* 77 N.Y.2d at 192, 566 N.E.2d at 1164, 565 N.Y.S.2d at 759; *Bittner v. Metropolitan Life Ins. Co.,* N.Y.L.J. Dec. 19, 1994, at 27 (Sup. Ct.

N.Y. Co.) (certifying nationwide class); *see also* Henry Aff. ¶ 12, Sexton Aff. ¶¶ 7-10, Hebron Aff. ¶ 48.

50. In evaluating this settlement, this Court is not required to rule on the merits of the Class Members' claims under New York law. Consistent with *Shutts*, the Court therefore has not made and is not required to make any substantive choice of law determinations. *See Shutts*, 472 U.S. 797 (1985); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 167-68 (S.D. Ohio 1992) (court approving class action settlement does not rule on merits of class member's claims and therefore cannot violate *Shutts*'s limitation on applying forum law to out-of-state residents); *see also Colt Indus. Shareholder Litig.*, 77 N.Y.2d at 199, 566 N.E.2d at 1168, 565 N.Y.S.2d at 763 (approving nationwide settlement class without making choice-of-law determination). Two additional factors provide separate and independent reasons why no choice-of-law determination need be made in order to assess the fairness of this settlement. First, the legal obstacles that plaintiffs would face in litigating their claims go to standard requirements that they would face under any applicable law, even if the laws that might apply to different Class Members' claims varied in respects that would be significant were the case to be litigated. Additionally, the unique feature of the ADR Process devised by the parties eliminates the risk that differences in individual issues of substantive law between states, if any, would redound to the detriment of any Class Member bound by this Court's order. Indeed, the ADR Process largely or wholly eliminates the legal obstacles Class Members might otherwise face, thus rendering the ADR Process more favorable than traditional litigation under any applicable law.

50a. ***Subject Matter Jurisdiction.*** Because (*i*) Article 9 of the CPLR expressly gives this Court subject matter jurisdiction over the adjudication and compromise of class actions, and (*ii*) the causes of action in this case fall within the grant of general, original jurisdiction in law and equity provided this Court by Article VI, Section 7 of the Constitution of the State of New York, this Court has subject matter jurisdiction to approve the Settlement Agreement and all exhibits thereto (as described in Paragraph 1 of the Final Order and Judgment attached hereto) as fair, reasonable and adequate and to direct the parties to consummate the Agreement according to its terms and provisions.

IV. OBJECTIONS

51. As discussed in paragraph 43 above, 344 objections to the terms of the Settlement were received. Of these, 25 relate to the ADR Process; the vast majority of the remainder raise concerns about various aspects of Class Relief. The remaining objections discuss discovery, notice, jurisdiction, procedure, the scope of the release, or attorneys' fees.[5]

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[5] On November 13, 1995, Fatima Silva, a representative plaintiff in this action, filed an untimely objection to the settlement. Despite the objection's lack of timeliness and its references to certain individual problems Mrs. Silva has with New York Life that are not shared by the Class, the Court has considered Ms. Silva's objection. In doing so, the Court notes that objection by a representative plaintiff is by no means fatal to a proposed settlement. " 'Assent of the plaintiff (or plaintiffs) who brought a [class] action is not essential to a settlement; a contrary view would put too much power in a wishful thinker

52. *Scope of Discovery*. Several objectors assert that discovery was not sufficient to support plaintiffs' counsel's conclusion that there was no evidence of systemic misconduct by New York Life in this case. The Court finds that the extensive discovery undertaken by plaintiffs' counsel was more than adequate to allow counsel to assess the strengths and weaknesses of their case and to assess the fairness, reasonableness and adequacy of the proposed settlement and was sufficient to have uncovered systemic wrongdoing had it existed.

53. In particular, the Court notes that among the deponents examined by plaintiffs were five individuals who were agents during portions of the Class Period and five who were local managers and trainers during portions of the Class Period. The deponents also included senior officials with responsibility for training, compliance, sales practices and dividend practices. The deponents were (*i*) Lee Gammill, the Vice Chairman of New York Life, who is also a Member of its Board of Directors. Before becoming Vice Chairman, Mr. Gammill at various times served as Head of New York Life's Individual Life and Agency Departments and Head of Individual Operations. Mr. Gammill also has been a General Manager and

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or a spite monger to thwart a result that is in the best interests of the [class members].' " *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1078 (2d Cir. 1995) (citation omitted); *see also In re Ivan Boesky Sec. Litig.*, 948 F.2d 1358 (2d Cir. 1991) (affirming approval of class action settlement over "eleventh-hour objections" of several named plaintiffs); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1324 (2d Cir. 1990) (court can approve class action settlement even if majority of class representatives oppose it).

an agent in the field; *(ii)* Walter Shur, who at various times prior to his retirement served as the Head of New York Life's Individual Insurance Operations, Executive Vice President, Chief Actuary and Controller. In addition, Mr. Shur sat on New York Life's Board of Directors; *(iii)* Solomon Goldfinger, a Senior Vice President with New York Life who was the Head of its Individual Life Department at the time he was deposed. Mr. Goldfinger has held numerous positions in the Company, including Head of the Inforce Management Department; *(iv)* Lyle Paul, who prior to his recent retirement (which occurred after he was deposed), was a Senior Vice President of New York Life and Head of its Agency Department. Prior to holding these positions, Mr. Paul served as Head of the Individual Life Department and as a General Manager and agent in the field; (*v*) Anne Pollack, a Senior Vice President of New York Life in the Financial Management Department; (*vi*) Richard Wecker, who is a Senior Vice President of New York Life and is Head of its Marketing Department. Prior to holding this position, Mr. Wecker was a Senior Vice President in the Agency Department and served as a General Manager and agent in the field; (*vii*) Paul Morris, a Senior Vice President of New York Life who is Head of its Agency Department. Previously, Mr. Morris was a General Manager, a Sales Manager and an agent in the field; (*viii*) Michael Reeves, who is a Zone Senior Vice President of New York Life's Western Agencies. Prior to serving in this capacity, Mr. Reeves was a General Manager and an agent in the field; (*ix*) Shirley Hardison-Demuth, who is a Vice President in New York Life's Corporate Compliance Department and Head of that Department's Sales Material Review Unit. Previously, Ms.

Hardison-Demuth was an Associate General Manager and an agent in the field; (*x*) John O'Byrne, a Vice President in New York Life's Corporate Compliance Department who is Head of that Department's Complaint Review Unit; (xi) James Moore, who is a Corporate Vice President in New York Life's Individual Policyowner Services Department. Previously, Mr. Moore was a Sales Manager, a Training Manager and an agent in the field. Mr. Moore also served as a liaison to New York Life's illustration software vendor, ISIS; (*xii*) Deborah Prior, who at the time of her deposition was an Assistant Vice President in New York Life's Individual Life Department and was Head of the POP Support Unit; (*xiii*) David Tarella, who is an active agent with New York Life; and (*xiv*) Frank Ericksen, a retired agent of New York Life who is the inventor of POP, which is at issue in this lawsuit. Because Mr. Ericksen is elderly, his deposition took the form of an interview, and was not transcribed.

54. In short, plaintiffs deposed an array of the individuals most likely to have known of systemic misconduct had it existed. In addition, plaintiffs' counsel reviewed and analyzed thousands of policyowner complaint files. They also reviewed selected agent disciplinary files, many thousands of pages of sales materials generated both in the Home Office and in the field, and documents relating to New York Life's product development, dividend setting and illustration practices, including numerous documents gathered at the request of or filed with state departments of insurance. The Court finds further that *(i)* plaintiffs engaged in informal discovery and consulted experts even prior to the signing of the MOU and *(ii)* the MOU contained a provision that

made the proposed settlement contingent on the results of discovery. These facts dispose of the objections to the timing of discovery.

55. ***Objections to the ADR Process.*** Only a small percentage of objectors complain about the ADR Process. Among the objections raised are that the ADR Process is too complex and burdensome, that the ADR Process will be biased in New York Life's favor, and that Class Members will be unable to prove misrepresentation or other claims because they lack the necessary documentation. The Court finds these and all other objections to the ADR Process to be without merit. The ADR Process provides an efficient mechanism, at no cost to Class Members, by which individual claims can be resolved in an independent forum, free of bias in favor of plaintiffs or defendants, in accordance with fair and objective procedural and substantive criteria that have been negotiated by the parties in advance. *See* Coffee Aff. ¶ 3; Henry Aff. ¶ 11; Sexton Aff. ¶¶ 26-32; Adams Aff. ¶ 72. The ADR procedures are exceedingly simple and should encourage the submission and resolution of claims. Moreover, the range of relief available through the ADR Process includes forms of substantial relief that can be obtained even in the absence of written documentation of a misrepresentation or other claim.

a. ***Procedural Fairness.*** Some objectors complain that the initial ADR review will be undertaken by claim-review teams staffed by New York Life. The Court finds these objections to be without merit, because if the Class Member is dissatisfied with the claim-review team's determination, he or she is entitled to *de novo* review by an arbitrator. In addition to this *de novo* review, the Court

finds that a number of features of the ADR Process ensure that it will be a relatively simple, cost-free and fair procedure for Class Members. Among these features are: (*i*) the Policyowner Representative will protect the Class Members' interests in the ADR Process; (*ii*) the arbitrators will be selected by Lead Counsel from a list prepared by the AAA that is satisfactory to the parties; (*iii*) Class Members wishing to participate in the ADR Process need complete only a simple ADR election form and a claim form and attach their file if they have one with respect to their policy; (*iv*) New York Life will provide its file and will seek to obtain a sworn written statement and any relevant documents from the agent;[6] (*v*) Lead Counsel will also be available to answer questions: and (*vi*) Class Members may, if they wish, hire their own attorneys to assist in the Process.

b. ***Need for Documentation***. A number of objectors have asserted that Class Members will not have the documentation necessary to prevail in the ADR Process. While their point that oral as well as written misrepresentations may have occurred is well taken, the Court finds that they appear to misunderstand both the nature of the evidence needed and the sources from which that evidence will be gathered. First, while clear documentation or an agent's admission is generally required for the highest levels of relief, substantial relief can be awarded

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[6] The Settlement Agreement provides that in scoring or deciding a claim, the claim-review team may take into consideration the unreasonable failure to provide requested information or a statement that the claim-review team believes is important. *See* Settlement Agreement, Exhibit B at 13, 17.

without written evidence of a misrepresentation. For example, a policyowner's claim of oral misrepresentation may lead to significant relief if (*i*) there is evidence in the file that tends to corroborate the claim or (*ii*) if the agent's record includes six or more other similar complaints. Further, the claim-review teams and the arbitrators will review not only the papers submitted by the claimant, but also those provided by the agent and New York Life. In addition, the Court takes judicial notice that insurance documents are important papers that are routinely retained by policyowners; indeed, several objectors who spoke at the fairness hearing indicated that they had retained documentation that supported their ADR claims.

c. ***Alternative ADR Proposals.*** The Court has considered the suggestions of objectors Halpert, Mercer and Zoller (the "Halpert Objectors") and others for improving the ADR Process. The Court notes that the proposal of the Halpert Objectors is premised on a showing of systemic misconduct, which has not been made. In addition, it is not, as objectors recognize, the Court's function to amend the settlement proposed by parties. Rather, the Court must determine whether the settlement as negotiated by the parties and their counsel is fair, reasonable and adequate. None of the objectors' alternate proposals leads the Court to conclude that the ADR Process as proposed does not satisfy these criteria. To the contrary, the Court is persuaded by the parties and by the opinions of Professor John Coffee, of the Columbia Law School, James Henry, the President of CPR Legal Program (a non-profit alliance of corporations and law firms that seeks to develop alternatives to litigation), and Dean John Sexton of the New York University School of Law, that

the ADR Process proposed by the parties is a fair and efficient way of resolving the claims of Class Members. *See* Coffee Aff. ¶ 3; Henry Aff. ¶¶ 1, 11; Sexton Aff. ¶ 26-32.

56. ***Inadequacy of the Settlement's Benefits.*** The objectors who complain that the proposed settlement is inadequate make several points: *(i)* they would prefer cash or other relief different from that provided by the proposed settlement; *(ii)* they claim that they should not be required to spend money to avail themselves of the settlement's benefits; *(iii)* they believe that the settlement's benefits are not real or are insufficient or do not meet their needs; *(iv)* they assert that the settlement amounts to a windfall or a marketing program that benefits New York Life, and/or *(v)* they contend that the value of the settlement can be judged by its allegedly low cost to New York Life. Virtually all of these objections can be disposed of on the ground that they ignore the ADR mechanism of the proposed settlement. The ADR Process provides *every* Class Member with the opportunity for comprehensive compensatory relief in accordance with the terms of that Process. The adequacy of this proposed settlement therefore does not rest on the benefits available to Class Members who choose not to participate in the ADR Process, although those benefits are of course relevant to the adequacy determination. Further:

a. The Court finds the fact that some Class Members would prefer cash or other relief irrelevant to its determination of the adequacy of the settlement. *See In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 305 (N.D. Ga. 1993) (approving coupon settlement); *New York v. Nintendo of Am., Inc.*, 775 F. Supp. 676, 681 (S.D.N.Y.

1991) (same). In any event, many of the alternatives suggested by objectors, including refund of premiums with interest or insurance policies with no further out-of-pocket premiums due, are available to Class Members who demonstrate their entitlement to relief in the ADR Process. *See* Exhibit A to the Settlement Agreement. The Court also finds that the fact that the ADR Process does not make available punitive damages does not render it inadequate, because punitive and treble damages need not be considered in determining the range of recovery for settlement purposes. *Domestic Air Transp.*, 148 F.R.D. at 319 n.25; *Namoff v. Merrill Lynch, Pierce, Fenner & Smith (In re Dennis Greenman Sec. Litig.)*, 622 F. Supp. 1430, 1441 (S.D. Fla. 1985), *rev'd on other grounds*, 829 F.2d 1539) (11th Cir. 1987).

b. (i) The Class Members who object that they must spend money to obtain relief under the proposed settlement are mistaken. The ADR Process is available to every Class Member without monetary outlay. Class Members wishing to participate need simply elect ADR and submit a Claim Form. Contrary to the suggestion of some objectors, this proposed settlement therefore bears no resemblance to the settlement rejected by the United States Court of Appeals for the Third Circuit in *General Motors*, 55 F.3d 768 (3d Cir. 1995), in which the settlement's sole benefit to class members was a $1,000 certificate toward the purchase of a $20,000-$30,000 truck, or in the *Ford Bronco* settlement, *see In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 1995 WL 373061 (E.D. La. Mar. 20, 1995), in which class members were to have been provided merely with vehicle inspections and safety

information as consideration for the release of their claims, *id.* at *4.

(ii) While some of the alternatives to the ADR Process require a financial outlay by the Class Members, they too have little in common with the "coupon" relief rejected in *General Motors* and *Ford Bronco*. For example, OPLs are loans tailored to help keep *previously* purchased life insurance policies, for which Class Members have already paid substantial amounts, in force.[7] And they provide eligible Class Members with credit at interest rates lower than they are likely to be able to obtain elsewhere. Likewise, EVPs and EVAs are designed to fill the already-identified objectives of Class Members.[8] Like the OPLs and unlike the relief in the *General Motors* and *Ford Bronco* settlements, these benefits are tailored to the allegations of and the relief sought in the Complaint. In any event, settlements consisting solely or predominantly of discounts for the defendants' products or

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[7] The Court notes that the concern of some objectors that OPLs will lead to policy forfeiture is unwarranted. *See* Settlement Agreement at 23 (if OPL payments are not made, they convert to policy loans).

[8] The Court is not persuaded by the assertion that EVPs and EVAs constitute a "replacement" scheme. First, the Settlement Agreement expressly provides that EVAs may *not* be purchased with funds from other New York Life products. Settlement Agreement at 30. While EVPs do not contain the same restriction, there is no requirement that Class Members replace their heavily loaned policies. Rather, the availability of EVPs simply recognizes that the infusion of cash envisioned by the proposed settlement may not salvage a heavily-loaned policy. Further, EVAs and EVPs are available to the many Class Members who do not own New York Life policies at this time.

services have been approved by many courts. *See, e.g., Domestic Air Transp.*, 148 F.R.D. at 348; *New York v. Nintendo*, 775 F. Supp. at 679, 681-82; *Cuisinart Food Processor Antitrust Litig.*, 1983 WL 153, at *2, (D.C. Conn. Oct. 24, 1983); *Ohio Public Interest Campaign v. Fisher Foods*, 546 F. Supp. 1, 5, 12 (N.D. Ohio 1982).

c. The fact that some objectors find the settlement benefits to be of insufficient value or ill-suited to their needs does not merit rejection of the proposed settlement. All Class Members, including these objectors, will have the opportunity to choose between several forms of relief that provide real value. In particular, with the ADR Process, New York Life has committed to compensate all successful claimants without regard to the aggregate value of the claims as a whole. The decision of certain Class Members not to participate in the ADR Process or not to take advantage of the Class Relief does nothing to diminish the value of these benefits. *See Domestic Air Transp.*, 148 F.R.D. at 333 (coupons for discount travel have value even though Class Members who travel only during the holidays are unable to use them); *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 1986-1 Trade Cas. (CCH) ¶ 67,149 (E.D. Pa. June 10, 1986) (increase in title insurance still has value, even if some class members never have reason to file claims).

d. The Court does not find persuasive the objections that the settlement constitutes a windfall or marketing ploy for New York Life. The evidence shows that New York Life has already spent millions of dollars, not including its own attorneys' fees, for this proposed settlement and expects to spend millions more administering the settlement. Kaminski Aff. ¶¶ 2-6. The Court

finds that the products made available through the proposed settlement were not designed to make money. Indeed, EVAs are likely to lose money, while OPLs will at best break even. In the event that EVPs become economically successful, any profits will inure to the benefit of participating policyowners, including the purchasers of EVPs. *See* Supp. Hagstrom Aff., Ex. A at 3. In any case, the absence of any cap on New York Life's aggregate potential liability from successful claims submitted during the ADR Process renders these objections meritless.

e. Some objectors assert that New York Life's failure to submit evidence of a substantial reserve for this settlement demonstrates that the proposed settlement has little value. These objectors confuse cost and value. One positive feature of this proposed settlement is that much of the value it makes available to the Class comes at relatively little cost to New York Life and more particularly to its policyowners (many of whom are, of course, Class Members). *See, e.g.*, Babbel Aff. ¶ 16. For example, OPLs give Class Members the opportunity to borrow money at New York Life's borrowing rate plus the cost of administering the loans. There is therefore no cost to New York Life for which a reserve is required, although there is, of course, an indirect cost to New York Life in the form of the opportunity it has foregone to use its credit for other purposes. But regardless of the cost to New York Life, Class Members benefit from the spread between New York Life's cost of money and the rate at which they would otherwise be able to borrow. Likewise, EVPs and EVAs, because of reduced commissions and other costs, make value available to the Class without significant cost to New York Life or its policyowners. *See*, Babbel Aff.

¶¶ 11-15; Supp. Hagstrom Aff., Ex. A at 2-3. While the value to be provided by awards under the ADR Process would no doubt result in out-of-pocket costs for New York Life, objectors have not pointed to, and the Court is not aware of, any accounting principle that would require New York Life to establish a specific reserve for ADR claims that have not yet been filed pursuant to a proposed settlement that has not yet been approved.

57. ***Excessive Attorneys' Fees.*** Forty-six objectors object that the attorneys' fees to be paid by New York Life to plaintiffs' attorneys pursuant to the Settlement Agreement are excessive. The Court has taken the opinions of these Class Members into account in determining the appropriate attorneys' fees. However, the fact that New York Life agreed to pay plaintiffs' attorneys' fees and expenses, as determined by the Court, up to a maximum of $22 million, does not warrant the disapproval of the proposed settlement. It is the Court, not the parties, that will ultimately determine how much to award to plaintiffs' attorneys as "the reasonable value [of their] legal services rendered." *See* CPLR 909. New York Life's agreement to pay fees up to $22 million would be relevant to the settlement's approval only if there were evidence of collusion between defendants and the Class representatives or their counsel. No such evidence has been submitted. The settlement negotiations were extensive and at arms-length, and the Court was kept apprised of their progress. Counsel did not negotiate fees until they had agreed on the substantive terms of the settlement, and the parties' agreement to the settlement is not linked to the Court's approval of the fee request. In addition, the attorney fee award will be paid by New York Life and will not

reduce the Class recovery. Moreover, the work of Lead Counsel will continue well beyond this Final Order through the conclusion of the ADR Process.

58. ***Inadequate Notice.*** a. Two Class Members, the Halperts, have objected to the notice on the ground that they did not receive their mailed notices. Other Class Members object that their notices arrived late. These objections do not warrant rejection of the proposed settlement. The Class Action Administrator's records show that two notice packages were mailed to the Halperts, to the address specified on their objection, on August 17, 1995 and were not returned. Jones Aff. ¶ 15; *see also* Supp. Torres Aff. ¶¶ 4-7. The fact that all of these Class Members learned of the proposed settlement in time to submit timely objections constitutes further proof of the efficacy of the notice procedures. In any event, the Court has found that the combination of individual mailed and publication notice constitutes the best notice practicable under the circumstances. Neither the CPLR nor constitutional due process requires anything more.

b. A few Class Members have objected that the Class Notice is confusing or difficult to understand or is missing certain information regarding the details of the relief or other matters pertaining to the litigation. For example, one complaint is that the October 31 deadline for opt-outs and objections was not mentioned until page 11 of the notice. The Court has considered and rejected all of these objections as to the adequacy of the notice. The notice clearly set forth in plain English all information necessary to inform Class Members of their options, and also informed interested Class Members how to get additional information. Indeed, James Henry, an independent

legal expert, has commented favorably on the clarity of the notice. *See* Henry Aff. ¶ 12 ("[T]he personalized notice that was given to class members was a fair and objective presentation of the settlement terms, written clearly and in plain English."). Both the cover letter and the initial pages of the notice referred Class Members to the section containing the opt-out deadline, and the first line of the Notice warned Class Members in bold, capital letters that they should **"READ THIS *ENTIRE* NOTICE CAREFULLY"** (emphasis added). The law requires no more. *See, e.g., Weinberger,* 698 F.2d at 70 (because of practical constraints on the information that can, be provided in notice, even "very general" descriptions of the proposed settlement suffice).

c. The Halpert Objectors, complaining that notice was unclear, ask the Court to set a second opt-out period. The objectors point in particular to a reference in the Class notice to the preliminary injunction entered by this Court. *See* July Order at ¶ 14. The prohibition on parallel class actions was designed to prevent interference with the orderly notice and hearing process set by this Court in its July Order. Neither the order nor the notice barred opt-outs from litigating their claims against New York Life. Further, any Class Members with questions with respect to the notice could and should have sought clarification during the opt-out period. *See, e.g., In re VMS Ltd. Partnership Secs. Litig.,* 26 F.3d 50, 51-52 (7th Cir. 1994). The Court has carefully considered the request that the opt-out period be extended for all Class Members, but finds that the notice satisfied all applicable legal standards and therefore denies the request.

d. Similarly, after the objectors' deadline for filing post hearing submissions had passed. i.e., November 30, 1995, the Court received a submission on December 7, 1995 entitled "Class Members' Motion Requesting Exclusion From Settlement Class Despite Expiration of the Initial Opt Out Deadline" filed by the Texas law firm of Fleming, Hovenkamp & Grayson, P.C. The Court notes that this "motion" was not properly filed in accordance with the procedures of this Court and not in the proper form. However, the Court has considered and hereby denies the requested relief.

59. ***Class Action Procedure***. One objector contends that the opt-out deadline violates due process because it requires Class Members to choose between objecting to the settlement or excluding themselves from the class action. Such a procedure is, however, fully consistent with the due process requirement that Class Members have an "opportunity" *either* "to be heard and participate in the litigation" *or* "to remove [themselves] from the class." *See Shutts*, 472 U.S. at 812. Due process does not require this Court to give Class Members the opportunity to participate in the settlement hearing, wait and see whether they are satisfied with the outcome, and then decide whether they wish to be bound by the judgment. *See, e.g., id.* at 801, 812 (approving, as consistent with federal due process, procedure in which class members had opportunity to opt out only prior to litigation of the merits of their claims); *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 618, 634-35 (9th Cir. 1982) (due process does not require a "second chance" to opt out of a class action when settlement is reached after the expiration of the opt-out period). *cert. denied*, 459 U.S.

1217 (1983); *Langford v. Devitt*, 127 F.R.D. 41, 45 (S.D.N.Y. 1989) ("the opportunity to file objections to a proposed settlement does not provide an additional opportunity to opt out of a class"); *cf. In re Prudential Sec. Inc. Limited Partnership Litig.*, 1995 U.S. Dist. LEXIS 12579, at *12 (S.D.N.Y. Aug. 29, 1995) ("a settlement class in complex litigation (such as this case), actually enhances absent class members' opt-out rights because the right to exclusion is provided simultaneously with the opportunity to accept or reject the terms of a proposed settlement").

60. ***Discrimination Against Class Members.*** a. Several Class Members argue that the settlement discriminates against these who are poor and cannot afford the Class Relief. Others argue that the settlement discriminates against older or retired Class Members. Some complain that the settlement discriminates against Class Members whose policies have terminated, while others complain that it discriminates against those with policies that are still in force. The Court finds that these objections are without merit. The ADR Process provides an equal opportunity for every Class Member, rich or poor, young or old, terminated or in-force, to pursue his or her individual claim and to obtain individualized relief. The Class Relief has also been designed to make sure that relief tailored to the Class Members' circumstances is available to those who choose not to participate in the ADR Process. While older Class Members may not need or be able to obtain EVPs, EVAs have relaxed surrender charges for older Class Members precisely to ensure that such Class Members have access to useful Class Relief. It is appropriate to tailor relief to specific Class Members' circumstances. *Cohen v. RTC*, 61 F.3d 725, 728 (9th Cir.

1995) (settlement properly treats class members differently where differences are "rationally based on legitimate considerations"); *Domestic Air Transp.*, 148 F.R.D. at 341 ("The allocation of the proceeds so as to provide a meaningful recovery to all class members is 'rationally based on legitimate considerations' ") (citation omitted). The Court finds that although the proposed settlement makes different relief available to different Class Members, it treats Class Members fairly.

b. The Court further finds that (*i*) every Class Member shares a similar interest with respect to the claims that New York Life's sales, dividend and interest rate practices caused injury; *(ii)* to the extent that variations in Class Members' age, policy size, policy type, policy status, financial circumstances or type of misrepresentation claim give Class Members somewhat different interests, those interests are not in any way antagonistic and are adequately represented by the Class representatives, one or more of whom share each of the relevant characteristics; and (*iii*) any such variations do not warrant the creation of subclasses. *See* CPLR 906.

61. ***Complaints.*** A number of objectors include in their objections allegations that they were injured by New York Life's sales practices with respect to the premium offset proposal, policy replacements or misleading representations about the investment, savings or retirement aspects of policies. Many of these "objections" actually appear to be claims that Class Members seek to submit to the ADR Process, and thus may as easily be viewed as support for the settlement that makes the ADR Process available. But even if these Class Members intended their

submissions as objections, the Court finds that their submissions tend to support the proposed settlement. The proposed settlement's ADR Process will enable these and other Class Members to have the individual circumstances of their claims resolved by means of a fast, efficient, fair and cost-free mechanism that avoids the time and expense of both individual litigation and the individual mini-trials on causation, reliance and damages that would likely be required were this action to proceed as litigation.

62. *Scope of the Release.* *a.* One objector objects that the release is overbroad, because it releases claims not contained in the Complaint. That objection is without merit. The Complaint includes allegations relating to all aspects of New York Life's sale and subsequent treatment of the policies and policyowners encompassed by the Class definition. Thus, even if there were a requirement of correspondence, the release fairly corresponds both to the scope of the allegations made and the relief to be made available to remedy the alleged harm. In any event, adequate class representatives may release even claims that were not – and could not – have been brought in the settled action. *See, e.g, Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 34 (1st Cir. 1991); *TBK Partners. Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982). Here, the release has been exchanged for settlement benefits that include an ADR Process that allows Class Members to pursue all claims that they have against New York Life, not just those included in the Complaint. Finally, Class Members who did not wish to be bound by the release, which was printed in full in the Class Notice, had the opportunity to exclude themselves from the Class.

b. Other Class Members object that agents should either not be released or should be required to contribute to the proposed settlement. The parties have explained that their objective was to finally resolve this action and that New York Life could not agree to a settlement that did not release its agents because such a settlement would provide no finality, in that if dissatisfied policyowners sued New York Life agents, the agents would likely tun, to New York Life for indemnity or contribution. The Court finds that *(i)* the need for finality necessitates release of New York Life's agents; *(ii)* the cooperation of agents will enhance the success of the ADR Process and it is therefore in no one's interest to automatically penalize agents; and *(iii)* New York Life has retained its discretion under the Settlement Agreement to supervise and discipline agents as warranted. *See* Settlement Agreement at 55-56. The Court therefore rejects these objections.

63. ***Appointment of Class Guardian.*** At least one objector has requested that the Court appoint a guardian to protect the interests of the Class. The Court finds no need to appoint a guardian to assist the Court in ensuring that the proposed settlement is fair or to represent Class Members in this case. Lead and Co-Lead counsel are respected and experienced members of the plaintiffs' bar who are amply qualified to protect the interests of the Class, and no objector has cited evidence that they have not done so here. The Court is fully satisfied that the interests of the Class have been well represented.

64. Several objectors who appeared at the fairness hearing suggested that they had not had sufficient time to analyze and respond to the materials submitted by the

parties in support of the proposed settlement. The Court provided an additional opportunity for these objectors to brief their positions as to both the proposed settlement and the attorneys' fee request and finds that all Class Members have had ample opportunity to provide to the Court their views as to both the proposed settlement and the fee request.

65. The Court has considered each of the other objections and finds them to be without merit.

V. THE FAIRNESS, REASONABLENESS AND ADEQUACY OF THE PROPOSED SETTLEMENT

66. CPLR 908 requires that "[a] class action shall not be dismissed, discontinued or compromised without the approval of the Court. The CPLR does not prescribe specific guidelines for evaluating proposed settlements, but it is appropriate to consider the following factors: (*i*) the likelihood that plaintiffs will succeed on the merits; (*ii*) the extent of support from the parties; (*iii*) the judgment of counsel; (*iv*) the presence of good faith bargaining; and (*v*) the complexity and nature of the issues of law and fact. *See, Colt Indus. Shareholder Litig.*, 155 A.D.2d at 159, 553 N.Y.S.2d at 141; *Klurfeld*, 79 A.D.2d at 133, 436 N.Y.S.2d at 308; *Friedman v. Northville Indus. Corp.* (Sup. Ct. Suffolk Co.), N.Y.L.J., Dec. 27, 1991, at 21. The focus of the Court's inquiry is whether the settlement is fair, reasonable and adequate when its benefits are viewed against the risks and possible benefits of litigation. *See Weinberger*, 698 F.2d at 73. This analysis supports approval of the proposed settlement in this case.

67. ***The Value of the Settlement.*** The settlement offers a two-tier approach that provides benefits tailored to the allegations of the complaint and to each Class Member's circumstances. Those Class Members who believe that they were wronged by New York Life can participate in the individual ADR Process. Those who do not believe that they were damaged by the wrongful actions of New York Life, or do not wish to participate in the ADR Process, may choose the Class Relief.

68. The value of the proposed settlement consists of three elements: *(i)* the value of the ADR Process, both the Process itself and the relief to be paid successful claimants, the aggregate amount of which is not capped; *(ii)* the value of the Class Relief (OPLs, EVPs and EVAs); and *(iii)* the substantial amounts that New York Life has paid and will pay in settlement and administrative expenses for the benefit of the Class.

69. While the innovative nature of the proposed settlement makes valuation difficult, it is clear that the benefits to be provided to the Class are substantial.

a. Defendants' expert, Milliman & Robertson, has estimated that the total value being made available to the Class through the Class Relief exceeds $2 billion. M&R Report, Exhibit A to Hagstom Aff., at 2, 6-7.

b. Milliman & Robertson also estimates that 28% of the Class will elect some form of Class Relief, and that it is reasonably possible that at least 50% of the Class will do so. If 28% of the Class elects some form of Class Relief, Milliman estimates that the value of the relief actually realized by Class Members will total some $357

million; if 50% do so, the value realized will exceed $500 million. M&R Report at 14, 25, 38.

c. Plaintiffs' expert, Coopers & Lybrand, using what they term conservative utilization estimates, provides a low range estimate of $158 million utilization o the Class Relief, a base estimate of $265 million, and an estimate based on slightly more optimistic assumptions of $478 million. Faucett Aff. ¶ 5.

d. Coopers & Lybrand has also estimated that for each 1% of policies in the Class (35,000) that submit ADR claims where the average score exceeds a "1", the resulting value to policyowners would range from $150 million to $178 million. Faucett Aff. ¶ 6.

70. The Court finds these expert analyses credible and well-reasoned. No opponent of the settlement has proffered evidence disputing the analyses. While the Halpert Objectors question the assumptions and the valuation analysis contained in the M&R Report, they provide no analysis of the data provided in the M&R Report that contradicts those numbers. Nor do they provide evidentiary support for their attack on the Report's assumptions. The Halpert Objectors suggest, but do not actually request, that given 60 days and access to New York Life's actuarial database, they could dispute the parties' evidence with respect to the value of the proposed settlement. The Court rejects this suggestion. These objectors have had ample opportunity since they learned of the proposed settlement to request such data; they did not do so. The Court finds further that the objectors' expert had sufficient data, in the form of the M&R Report and the Faucett affidavit, which were in objectors' hands since at

least November 13, to test the analyses provided by the parties and to provide specific examples to support their assertion that more time and data are required. Their papers, however, include no evidence or testimony (other than the unsubstantiated assertions of Harold Mercer) that casts doubt on the analyses or numbers provided by these experts or warrants the suggested additional time. Indeed, these objectors do not even dispute the analysis provided in the Faucett Affidavit. Because objectors provide no basis for delaying the benefits of the proposed settlement to the overwhelming majority of the Class who support it, the Court rejects the request for additional data and time. The Court similarly rejects the request of counsel for the Demirdjians, Mr. Schonbrun, for another hearing with respect to the attorneys' fee request. The Court notes that it invited Mr. Schonbrun to brief his request but that he did not do so.

71. Without adopting any of the particular value estimates provided by these experts; the Court finds that the parties have established that enormous value will be provided to the Class through this settlement. Because of the innovative nature of the proposed settlement, the actual value of the relief that will be taken by the Class cannot be ascertained with precision. The Court finds, however, that the proposed settlement is of substantial value to the Class and that it is reasonable to expect that more than $300 million in value will actually be realized by the Class.

72. The Court notes several other factors that enhance the value of the proposed settlement for the Class.

a. First, the ADR Process provides every Class Member with an opportunity to have his or her individual claim determined in a timely, cost-free manner and evaluated in accordance with fair and objective predetermined evidentiary and relief criteria. Every Class Member therefore receives value from the settlement.

b. There is no cap on the aggregate value of the relief to be afforded to claimants in the ADR Process. Thus, every claimant who demonstrates his or her claim will receive the full relief to which he or she is entitled, as determined by the criteria specified in the Settlement Agreement.

c. Finally, unlike some other class action settlements in which the value of the relief provided depended on highly contingent future purchases, the Class Relief here is tailored to meet the allegations of the Complaint and the specific insurance and investment needs of the Class Members. *See* Babbel Aff, ¶¶ 3, 15; M&R Report at 38-40.

73. ***The Likelihood of Success.*** The following are issues that would present obstacles to plaintiffs' success at trial, obstacles which plaintiffs might or might not overcome, if these matters were to proceed to litigation rather than settlement.

a. Proving that Class Members were unaware that dividends or interest crediting rates could fluctuate in light of the written disclosures, including the policy forms and the illustrations, given to Class Members;

b. Proving that Class Members were unaware that they had purchased life insurance or that, because of

the costs associated with providing the guaranteed benefits of the life insurance, the cash value would not accumulate in a life insurance policy at the rate at which it might accumulate in other investment vehicles, given the written disclosures, including the policy forms and illustrations, provided to Class Members;

c. Gaining and maintaining class certification throughout the litigation if this action were litigated rather than settled;

d. Establishing the elements of their various causes of action and, in particular, overcoming New York Life's contentions that *(i)* the contract rights that they assert are *(a)* contradicted by the plain and unambiguous language of the policies that constitute their contracts with New York Life, *(b)* unenforceable for lack of definiteness, and/or *(c)* barred by the statute of frauds; *(ii)* their fraud, negligent misrepresentation and GBL § 349 causes of action are not tenable because they assert not misrepresentations of present fact, but rather (*a*) mere expressions of opinion as to the suitability of purchasing the life insurance product for certain purposes and/or (*b*) at most mere promises or predictions concerning future performance or obligations; and (*iii*) their unjust enrichment claim cannot be based on allegedly excess premium payments given that their payment of premiums is governed by their contracts with New York Life; and

e. Establishing that Class Members' claims are timely under applicable statutes of limitations.

74. In light of the obstacles that plaintiffs face in proving their case, the risk that plaintiffs might lose on

the merits at trial supports approval of the settlement. *See, e.g., Agent Orange*, 818 F.2d at 171, 174.

75. ***Extent of Support from the Parties.*** The small number of opt outs and objections from Class Members relative to the size of the Class, and the lack of merit of the objections that were made, support approval of the settlement. *See, e.g., In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. 710, 854 (E.&S.D.N.Y. 1991) ("The reaction of class members to a proposed settlement offers some guidance to the courts about the perceived alternatives and fairness of the agreement."), *vacated on other grounds*, 982 F.2d 721 (2d Cir. 1992), *and modified on reh'g*, 993 F.2d 7 (2d Cir. 1993). While the silence of Class Members cannot always be construed as acquiescence, this Class has not been silent. The Class Administrator has received nearly 100,000 phone calls on the 800 number for policyowners. In addition, many Class Members wrote letters of inquiry about the proposed settlement or called plaintiffs' counsel directly. But only 0.2 percent of Class Members have opted out, and less than 0.02 percent have objected to the settlement. *See, e.g., Friedman*, N.Y.L.J., Dec. 27, 1991, at 21 (approving settlement where approximately 0.5 percent of class requested exclusion and 1.5 percent objected, noting that "the evidence indicates that there is support for the proposed settlement among the members of the class"); *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 24 (2d Cir. 1987) (affirming approval of settlement despite opposition of 36 percent of class); *In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litig.)*, 607 F. Supp. 1312, 1321 (S.D.N.Y. 1985) (approving settlement and noting that 0.3 percent exclusion rate was "minuscule").

Moreover, the extensive press coverage and the significance many people attach to their insurance policies suggest that opt-out and objection rates would be higher here if Class Members did not generally support the settlement.

76. ***The Judgment of Counsel.*** The judgment of counsel weighs in favor of approval of the settlement. Melvyn I. Weiss, who is Lead Counsel for the Class and a leading and respected member of the plaintiffs' bar, and his Co-Lead and other plaintiffs' counsel, are of the professional view and judgment that the proposed settlement and particularly its ADR Process is an innovative mechanism for allowing class-wide resolution of claims that include individual elements and is of great benefit to the Class. *See, e.g., Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) (court is "entitled to rely upon the judgment of experienced counsel for the parties"); *Smith v. Vista Org., Ltd.*, 1991 WL 152612, at *5 (S.D.N.Y. July 30, 1991) (in appraising fairness of proposed settlement, view of experienced counsel favoring settlement is entitled to "considerable weight" (citations omitted)).

77. ***The Presence of Bargaining in Good Faith.*** The factor regarding the presence of good-faith bargaining also supports approval of the settlement in this case. Negotiations leading to the settlement were lengthy, beginning in December 1994 and continuing through July 1995, and were at times contentious. There is no evidence that suggests collusion or lack of arm's-length bargaining. The record shows instead that negotiations were extensive, lengthy and conducted at arm's length. Plaintiffs insisted on, and got, an outside ADR Process. Plaintiffs also refused to agree to be bound by the settlement

until they had ample opportunity to review the strengths and weaknesses of their case, through extensive discovery and access to other information and consultation with experts. Counsel kept the Court apprised of the status of negotiations, meeting with the Court for conferences several times before the execution of the Settlement Agreement. *See, e.g., Weinberger*, 698 F.2d at 74 (protracted settlement negotiations, ability and experience of plaintiffs' counsel and extensive discovery preceding settlement all were "important indicia of the propriety of settlement negotiations" and favored settlement approval); *Chatelain v. Prudential-Bache Sec., Inc.*, 805 F. Supp. 209, 212 (S.D.N.Y. 1992) (court should approve settlement where it is the result of arm's-length negotiations conducted by experienced plaintiffs' counsel who have "engaged in adequate discovery necessary to represent the class effectively").

78. ***The Nature of the Issues of Law and Fact.*** The nature of the issues of law and fact also supports approval of the settlement in this case. If the case were to proceed as litigation, the litigation would be complex, lengthy and expensive. Defendants would defend vigorously, and in light of the fact that motions to dismiss are pending, that class certification proceedings had not yet begun, and that defendants would likely appeal any verdict that held them liable, it would likely be years before Class Members would see any recovery even if the Class were eventually to prevail. *See, e.g., Lowenschuss v. Bluhdorn*, 613 F.2d 18, 19 (2d Cir.) (settlement approved where further litigation would have been "expensive and protracted" with no guarantee of any relief to class), *cert. denied*, 449 U.S. 840 (1980); *In re Marine Midland Motor*

Vehicle Leasing Litig., 155 F.R.D. 416, 419-20 (W.D.N.Y. 1994) (settlement approved where further litigation would have included additional discovery, motions, trial preparations, trial, and appeal; "[s]uch protracted litigation would undeniably have . . . delayed the payment of any judgment to the class members" (citations omitted)). In addition, any Class recovery eventually achieved would likely be reduced for attorneys' fees and expenses.

79. Moreover, the size of the nationwide Class and the potential existence of individual issues could make this Class action difficult to manage. *See, e.g., Detroit v. Grinnell Corp.*, 495 F.2d 448, 457, 467 (2d Cir. 1974) (judicial delay and uncertainty of outcome caused by need for separate liability and damage adjudications weighed strongly in favor of settlement); *Domestic Air Transp.*, 148 F.R.D. at 317, 325-26 & n.32 ("adjudication of claims of two million claimants could last half a millennium"). The proposed settlement's ADR Process, however, allows adjudication of these individual issues to begin immediately in an organized and efficient fashion. Class Members will be represented by a Policyowner Representative and will therefore have no need to hire counsel (although they may do so if they wish). Depending on the level of proof supporting their claims, they are eligible for a sliding scale of remedies providing comprehensive compensatory relief, including, for example, a paid-up policy or rescission with a return of premiums plus interest. *Compare Marshall v. Holiday Inc.*, 550 F.2d 1173, 1176, 1178 (9th Cir. 1977) (settlement was "more than fair" where class members with valid claims were to receive 100 percent reimbursement from defendant).

80. The Court has also considered the opinions of the numerous outside experts who have commented that the settlement – particularly the combination of the individual ADR Process with Class Relief – is an innovative solution to the manageability and fairness issues posed by many class actions and fairly addresses Class Members' claims. *See* Coffee Aff. ¶ 3; Henry Aff. ¶¶ 11-12; Sexton Aff ¶¶ 26-52.

81. The Court has considered as well the views of commentators who have criticized the proposed settlement. While some of these commentators suggest Class Relief could be made more valuable, the Court finds that the essence of settlement is compromise and that the combination of the ADR Process and the available Class Relief provides substantial relief to Class Members that is tailored to the allegations of the Complaint and the circumstances of Class Members, and is sufficiently valuable to warrant approval of the settlement. The Court also notes that the parties have made changes to the Settlement Agreement in response to the criticism of objectors and others. These changes include, for example: *(i)* a change in the method of appointment of arbitrators, all of whom will now be appointed by plaintiffs' counsel from an AAA list acceptable to the parties; *(ii)* changes in EVPs that make this relief more accessible to Class Members; and *(iii)* a change in the Agreement with respect to discovery documents, which will now be retained by Lead Counsel for one year after the settlement becomes final, and indefinitely if they are used in the ADR Process. *See* Hebron Aff. ¶ 33; *id.* at Ex. D at 3-11.

82. The Court has also considered the fact that New York Life has reviewed the proposed settlement, either in

personal meetings or by letter, with every state insurance regulator. *See* Hebron Aff. ¶ 43. A number of regulators, including officials in the Maryland and New Jersey departments, have commented favorably on the settlement in remarks that have been quoted in the news media or in speeches. *Id.* ¶¶ 45-46. No insurance regulator has sought to intervene to oppose the settlement or to interpose an objection in this proceeding. Most significantly, the Court notes the opinion of the New York Insurance Department, which urged the Court to approve the settlement as a "fair and innovative" solution to Class Member claims.

83. The Court finds that the proposed settlement is fair, reasonable and adequate and in the best interests of the Class.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO PLAINTIFFS' ATTORNEYS' FEES AND EXPENSES

84. Subsequent to negotiating the terms of the proposed settlement, plaintiffs' counsel and defendants' counsel negotiated terms pursuant to which, if approved by the Court, New York Life would pay plaintiffs' counsels' fee and reimburse plaintiffs' counsels' expenses up to a total of $22 million, to be paid (*i*) one-half within 14 days after the Final Settlement Date (as that term is defined in the Settlement Agreement), and (*ii*) one-half plus interest 12 months after the first payment.

85. Plaintiffs' counsel now request that the Court approve their application for an award of attorneys' fees in accordance with this agreement. Plaintiffs' counsel

request attorneys' fees and expenses in the amount of $22 million, consisting of $21,123,436 in fees and $876,564 in reimbursements of expenses.

86. The Court finds that the fee negotiations in this case were conducted at arm's length, and only after all of the terms of the settlement had been agreed upon. Moreover, the Court finds significant that the fee will be paid by New York Life, separate and apart from any recovery to the Class. This means both (*i*) that the fee awarded will not diminish the Class recovery, and (*ii*) New York Life had a particular incentive to negotiate the fee at arm's length. There is no evidence in this case that the settlement was in any way collusive.

87. Under such circumstances, the negotiated fee is entitled to a great deal of weight in considering the fee request. *See, e.g., In re First Capital Holdings Corp. Fin. Prods. Litig.*, 33 F.3d 29 (9th Cir. 1994); *In re M.D.C. Holdings Sec. Litig.*, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,474, at 97,487-88 (S.D. Cal 1990); *Armstrong v. Board of School Directors of the City of Milwaukee*, 471 F. Supp. 800, 810-11 (E.D. Wis. 1979), *aff'd*, 616 F.2d 305 (7th Cir. 1980); *see also Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 720 (5th Cir. 1974); *In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*, [1992] Fed. Sec. L. Rep. (CCH) ¶ 96,937 at 93,969 (C.D. Cal. 1992); *In re General Mills Oat Cereal Consumer Litig.*, No. 94 CH 6208 (Cook County Circuit Court, Illinois; July 14, 1995), at 49-50.

88. In testing the reasonableness of the negotiated fee, the Court first looks to the percentage of the recovery approach. In this connection, the Court notes that federal

courts around the country, including federal district courts in New York, appear to be turning away from the lodestar/multiplier approach, and are returning to the more traditional percentage of the recovery approach. *See, e.g., In re Thirteen Appeals Arising Out Of The San Juan DuPont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir. 1995); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 821-22 (3d Cir.), *cert. denied*, 116 S.Ct. 88 (1995); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1294 n.2 (9th Cir. 1994); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993); *Rawlings v. Prudential-Bache Properties. Inc.*, 9 F.3d 513, 516 (6th Cir. 1993); *In re Continental Illinois Sec. Litig.*, 962 F.2d 566 (7th Cir. 1992); *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768 (11th Cir. 1991); *Paul, Johnston, Allston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir.), *cert. denied*, 488 U.S. 822 (1988); *Dubin v. E.F. Hutton Group*, 878 F. Supp. 616, 621 (S.D.N.Y. 1995); *In re RJR Nabisco, Inc. Sec. Litig.*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,984, at 94,267-69 (S.D.N.Y 1992); *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 596-97 (S.D.N.Y. 1992); *Breiternan v. Roper Corp.*, [1989-1990 Transfer Binder] Fed. Sec. L. Rep (CCH) ¶ 94,885, at 94,832 (S.D.N.Y. 1990); *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160 (S.D.N.Y. 1989). *See also Task Force Report*, 108 F.R.D. 237, 242 (1985).

89. The evidence in this case, including several expert affidavits, establishes that the ultimate value to the Class of this "no cap" settlement is in excess of $300 million. Indeed, this appears to be the most conservative of conservative estimates. *See* Faucett Aff. at ¶¶ 5-7; M&R

Report at 14, 38. In addition, this estimate does not include the cost of providing notice to the Class, which ordinarily is borne by the plaintiffs. *See* CPLR 904. Here, the cost of providing notice was borne by New York Life, which already has expended more than $15 million in notice and administrative expenses.

90. Using $300 million as a minimum for valuing the settlement means that the negotiated fee is less than seven percent of the recovery. This is at the low end of fees awarded in similar cases; indeed, viewed as a percentage of the recovery, even a much higher fee would be reasonable. *See, e.g., Blum v. Stenson,* 465 U.S. 886, 904 (1984) (approving one-third); *In re Warner Communication Sec. Litig.,* 618 F. Supp. 735, 759 (S.D.N.Y. 1985), *aff'd,* 798 F.2d 35 (2d Cir. 1986) ("traditionally, courts in this Circuit and elsewhere have awarded fees in the 20%-50% range in class actions"); *In re Crazy Eddie Sec. Litig.,* 824 F. Supp. 320, 326 (S.D.N.Y. 1993) (one-third); *Chatelain,* 805 F. Supp. at 215 (one-third).

91. Moreover, the negotiated fee also is reasonable under the lodestar/multiplier approach. Under this approach, courts generally test the appropriate multiple of lodestar by looking to such factors as the time and labor spent; the magnitude and complexity of the litigation; the responsibility undertaken; the amount recovered; the standing of both plaintiffs' counsel and defense counsel at the Bar; the existence or lack of any prior judgment or decree in any case brought by the government; the knowledge the court has of conferences, arguments that were presented and of work shown by the record to have been done by attorneys for the plaintiffs; what it would be reasonable for counsel to charge a

victorious plaintiff; the contingent nature of success; the novelty of the issues presented; and the public interest in encouraging "private attorneys' general". *See, e.g., Denco v. Genesco, Inc.*, N.Y.L.J., February 22, 1982, at 15, col. 2 (Sup. Ct. N.Y. Co. 1982); *Sternberg v. Citicorp. Credit Serv., Inc.*, 110 Misc. 2d 804, 442 N.Y.S.2d 1017, 1021 (Sup. Ct. Nassau Co. 1981); *Washington Fed Sav. & Loan Ass'n v. Village Mall Townhouses, Inc.*, 90 Misc. 2d 227, 394 N.Y.S.2d 772 (Sup. Ct. Queens Co. 1977).

92. Here, plaintiffs' counsel have submitted evidence that their lodestar in this case is at least $4,568,576, which represents more than 20,000 hours of professional time. This includes time from certain law firms from Pennsylvania that have indicated their intention to dismiss state-wide class actions in favor of this nationwide class action and lawyers from Louisiana who appeared in court in Louisiana to protect Class Members' interests. The Court finds that these lawyers have contributed to the resolution of this action.

93. The requested fee of $21,123,436 results in a multiplier of approximately 4.6 times the lodestar. For the reasons set forth elsewhere in these findings, the above-mentioned factors fully support a multiplier of 4.6 times the lodestar. Indeed, in making this finding, the Court notes that other courts have awarded fees that resulted in significantly higher multiples of the lodestar. *See, e.g., Weiss v. Mercedes-Benz of North America, Inc.*, 1995 U.S. Dist. LEXIS 14708 (D.N.J. May 11, 1995), *aff'd*, 1995 U.S. App. LEXIS (3d Cir. 1995) (Becker, J.) (awarding fee that resulted in a multiple of 9.3 times the lodestar); *In re RJR Nabisco, Inc. Sec. Litig.*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,984, at 94,267 (S.D.N.Y. 1992) (multiplier

of 6); *Cosgrove v. Sullivan*, 759 F. Supp. 166 (S.D.N.Y. 1991) (multiplier of 8.74); *Glendora Community Redevelopment Agency v. Demeter*, 155 Cal. App. 3d 465 (1984) (fee award was 12 times the lodestar).

94. In any event, the actual multiplier award effectively is less because the lodestar does not take into account the work still to be done by plaintiffs' counsel in the implementation of this settlement.

95. The Court has considered the objections that have been raised to the fee request, including the objections raised by Lawrence Schonbrun, Esq. on behalf of Ron and Silva Demirdjian, and Randy J. Ungar, Esq. on behalf of Leon Zoller, and finds them to be without merit. Rather, the Court finds persuasive the affidavit submitted on plaintiffs' behalf by Arlin M. Adams, Esq., a former judge of the United States Court of Appeals for the Third Circuit.

96. Accordingly, the Court hereby grants plaintiffs' request for $22 million in fees and expenses consisting of counsel fees in the amount of $21,123,436 and reimbursement of expenses in the amount of $876,564. However, in view of the fact that much work needs to be done promptly the court declines to award interest on any portion of the fees and expenses that are deferred.

FINAL ORDER AND JUDGMENT

Based upon the submissions of the parties referenced above, and based upon this Court's Findings of Fact and Conclusions of Law as set forth above,

IT IS ORDERED, ADJUDGED AND DECREED:

1. This Final Order and Judgment incorporates herein and makes a part hereof (*i*) the Stipulation of Settlement, dated July 28, 1995 (a copy of which, without exhibits, is appended hereto as Exhibit A); (*ii*) the Settlement Agreement Amendments, dated November 8, 1995 (a copy of which is appended hereto as Exhibit B); (*iii*) Exhibit A (ADR Guidelines, as amended by the Settlement Agreement Amendments), Exhibit B (ADR Manual), Exhibit C (ADR Claim Form), Exhibit D (Class Notice), Exhibit H (Post-Settlement Summary Notice), Exhibit I (Summary Notice), Exhibit J (Schedule of Annual Loans), Exhibit K (Chart C Underwriting Guidelines) and Exhibit L (Confidentiality Agreement) to the copy of the Stipulation of Settlement attached as Exhibit C to the Affidavit of Robert J. Hebron, sworn to November 10, 1995; (*iv*) Exhibit D (a mailing insert in four languages (Spanish, Chinese, Korean and Vietnamese) to accompany Post-Settlement Notice) and Exhibit E (Election Forms) to the Supplemental Affidavit of Robert J. Hebron, sworn to November 14, 1995; and (*v*) Exhibit A (Post-Settlement Notice), Exhibit B (cover letter for Post-Settlement Notice), Exhibit C (question-and-answer brochure to accompany Post-Settlement Notice) and Exhibit D (map identifying regions for selection of regional arbitration panels) to the Second Supplemental Affidavit of Robert J. Hebron, sworn to December 11, 1995; *provided*, however, that the parties are hereby authorized to agree to and adopt such amendments and modifications to the documents implementing the Settlement Agreement (including, without limitation, the Post-Settlement Notice

materials and the ADR Manual) as shall be consistent in all material respects with this Final Order and Judgment.

2. A Settlement Class is hereby finally certified (the "Settlement Class") consisting of all persons or entities (the "Class Members") who had at the earlier of (*i*) July 25, 1995 and (*ii*) the time of the policy's termination, an ownership interest in one or more whole life insurance or universal life insurance policies issued by New York Life Insurance Company or New York Life Insurance and Annuity Corporation (both referred to as "New York Life") in the United States from January 1, 1982 through December 31, 1994 (the "Class Period"), including A.D. 82 and subsequent Whole Life, Employees Whole Life, Modified Premium Whole Life and Survivorship Whole Life policies ("Whole Life Policies"), as well as Target Life and Employees Adjustable Life policies ("Universal Life Policies") (referred to collectively as the "Policies"), but does not include persons or entities (unless such persons or entities are Class Members by virtue of their ownership interest in other Policies) (*i*) who were represented by counsel and who signed a document pursuant to a settlement of a claim or an actual or potential lawsuit that releases either or both defendants from any further claims concerning one or more Policies; (*ii*) who owned Policies on which the insured died while the Policy was in force; (*iii*) who own or owned at the time of the policy's termination Single Premium Whole Life Insurance policies, Variable Life Insurance policies, Variable Universal Life Insurance policies and/or the following corporate sponsored life insurance policies: Corporate Sponsored Universal Life policies, Target Life policies

with an Alternate Cash Surrender Value Benefit Endorsement, whole life policies issued to J.P. Morgan and Co., and Target Life policies issued to Bear Stearns & Co.; or (*iv*) timely excluded themselves from the Settlement Class pursuant to the July Order. A list of those persons who have excluded themselves from the Class is attached as Exhibit E to the Second Supplemental Affidavit of Michael T. Jones, sworn to December 12, 1995, and incorporated herein and made a part hereof.

3. The terms and provisions of the Settlement Agreement, including all exhibits and supplemental exhibits thereto, are hereby fully and finally approved as fair, reasonable and adequate as to, and in the best interests of, each of the settling parties and the settlement Class Members whose individual claims are hereby extinguished; and the settling parties and settlement Class Members are hereby directed to implement and consummate the Settlement Agreement according to its terms and provisions.

4. The Settling Parties are hereby directed to mail the Post-Settlement Notice materials in the form annexed to the Second Supplemental Affidavit of Robert J. Hebron as Exhibits A-C, as provided by the Settlement Agreement.

5. The terms of the Settlement Agreement and of this Final Order and Judgment, including all exhibits and supplemental exhibits thereto, shall forever be binding on, and shall have *res judicata* and preclusive effect in all pending and future lawsuits maintained by, the plaintiffs and all other settlement Class Members, as well as their

heirs, executors and administrators, successors and assigns.

6. The Release set forth in Section H of the Stipulation of Settlement dated July 28, 1995, is expressly incorporated herein in all respects, except that the effective date of the Release shall be the date of this Final Order and Judgment.

7. All Class Members are, from this day forward, hereby enjoined from:

(a) filing, commencing or prosecuting any lawsuit; or

(b) participating as a class member in any class action against New York Life in any jurisdiction based on or relating to the facts and circumstances underlying the claims and causes of action in this action, or to the Released Transactions (as that term is defined in the Settlement Agreement).

8. Paragraph 6 of this Final Order and Judgment covers, without limitation, any and all claims for attorneys' fees, costs or disbursements incurred by Lead Counsel, Co-Lead Counsel or any other counsel representing plaintiffs or settlement Class Members, or incurred by plaintiffs or the settlement Class Members, or any of them, in connection with or related in any manner to this Action, the settlement of this action, the administration of such settlement and/or the Released Transactions except to the extent otherwise specified in this Final Order and Judgment and the Settlement Agreement.

9. New York Life may, in its discretion, require any Class Member to resolve through the ADR Process

described in the Settlement Agreement any claim that constitutes a Part VIII Claim (as that term is defined in the Settlement Agreement).

10. Nothing in this Final Order and Judgment shall preclude any action to enforce the terms of the Settlement Agreement. Nor shall anything in this Final Order and Judgment preclude plaintiffs or Class Members from participating in the ADR Process described in the Settlement Agreement.

11. Counsel for the Class are hereby awarded attorneys' fees and reimbursement of their disbursements and expenses in the amount of $22 million, to be paid by defendants to Lead Counsel in two installments: (*i*) one half to be paid within 14 days after the Final Settlement Date (as that term is defined in the Settlement Agreement), and (*ii*) the balance to be paid at such time as their work is substantially concluded upon application to the Court. Lead Counsel will allocate and distribute this award of attorneys' fees and expenses among counsel for the Class.

12. Without in any way affecting the finality of this Final Order and Judgment, this Court hereby retains jurisdiction as to all matters relating to administration, consummation, enforcement and interpretation of the Settlement Agreement and of this Final Order and Judgment, and for any other necessary purpose.

13. Neither this Final Order and Judgment nor the Settlement Agreement is an admission or concession by defendants of any actual or potential fault, liability or wrongdoing or any other matter.

14. The Action, including all individual claims and Class claims presented thereby, is hereby dismissed on the merits and with prejudice against the plaintiffs and all other Class Members, without fees or costs to any party except as otherwise provided herein.

ENTER:

/s/ Walter M. Schackman
J.S.C.

/s/ Norman Goodman

APPENDIX F

CIVIL DISTRICT COURT FOR
THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 85-12441 DIVISION "E"

CYNTHIA SPEAKS, YOLANDA BLACKSTON,
AND VERA STRINGER

VERSUS

NEW YORK LIFE INSURANCE COMPANY

JUDGMENT

After considering the well briefed arguments of counsel, it is now ordered (1) the stay order issued on August 31, 1995, is modified (2) the motion for a preliminary injunction is denied, and (3) Intervenor and defendant's motion for a stay of this judgment is denied.

THE STAY ORDER

New York's Supreme Court claims jurisdiction over Louisiana residents by virtue of a class action lawsuit filed in the New York state court against New York Life Insurance Company. Louisiana residents identifiable with the plaintiffs' class, largely life insurance policy owners, were notified by certified mail of the class action. The notice provides the members of the class the option not to join in the lawsuit or settlement, and this option may be exercised by mailing a form notice, stamped and addressed.

The United States Supreme Court has held that a similar class action procedure in Kansas meets due process requirements, at least in so far as it gives state courts jurisdiction to adjudicate rights of certain non-residents. It distinguished the rights of the defendants and class action plaintiffs, finding minimal contact with the forum state was not a due process requirement for class action plaintiffs. It also approved the principal that those who do not exercise their option to remove themselves from the class will be deemed to have elected to be the members of the class plaintiffs in the lawsuit, and acquiesce in the jurisdiction of the forum state. *Phillips Petroleum Co. v. Shutts*, 105 S.Ct. 2965 (1985).

Therefore, because the New York Supreme Court has jurisdiction over Louisiana residents who do not "opt out", the question arises as to whether those residents must obey orders of the New York Supreme Court, prohibiting the filing of any other lawsuit in any state, individually or as a class action.

It would be grossly unfair to permit Louisiana residents to remain as plaintiffs, receiving all the benefits of the class action in New York, including the possibility of a favorable settlement, and yet permit them to ignore the orders of the New York court by filing a lawsuit in Louisiana, giving them two chances for a successful outcome instead of one. No one questions that this lawsuit is the same as the class action filed in New York. As a matter of either comity or full faith and credit to the acts of New York, for the above reasons, exercising the discretion granted by La. C. Civ. Pro. art. 532, I ordered further

action in this lawsuit stayed as to those Louisiana residents who do not "opt out" of the class action suit in New York.

On the other hand, the Supreme Court of New York seeks to exercise jurisdiction over those Louisiana residents who have opted out, prohibiting them from filing a class action lawsuit on the same cause of action in New York or any other state, including Louisiana. In *Shutts, supra,* the United States Supreme Court, after pointing out the different burdens of plaintiffs and defendants, noted that most important difference was that a plaintiff could end jurisdiction in the foreign state by simply giving notice that he or she wished to withdraw from the plaintiff class, emphasizing the ease of avoiding jurisdiction by simply giving notice.

Yet New York courts seek to place conditions on the right to "opt out" by prohibiting those non residents who opt out from filing any other class action lawsuit in Louisiana. In *Shutts,* supra, the Supreme Court held that state courts had jurisdiction only over those non residents who "elected" to remain class action plaintiffs by not opting out, not over those who did so. Therefore the New York Supreme Court's order prohibiting other lawsuit cannot be enforced against those Louisiana residents who elect to withdraw from the New York lawsuit.

Nor will this court exercise its discretion to stay proceedings as to those who have withdrawn. As the Supreme Court pointed out in *Schutts,* the exigencies of a situation may mean that a class action is the only solution.

In summary, State Courts have jurisdiction only over those non-resident plaintiffs who "elect" to remain class action plaintiffs by not expressing their preference to withdraw. State courts do not have jurisdiction over those who choose to withdraw, and the New York Supreme Court's order prohibiting other lawsuits cannot be enforced against those Louisiana residents who have withdrawn from the New York class action.

Additionally, if due process considerations rest heavily upon the case of opting out, then the right to "opt out" cannot be so limited. When the exigencies dictate the only logical procedure is a class action, the right to "opt out" cannot be conditioned by prohibiting the filing of a class action, which, as a practical matter, will deter most from exercising that right.

At the time this suit was filed, most, if not all plaintiffs had not withdrawn from the class action lawsuit in New York, and the stay is applicable as long as those parties remain plaintiffs in that lawsuit. This stay, however, does not apply to those plaintiffs, if any, who have withdrawn from it or who do so in the future.

THE PETITION FOR A PRELIMINARY INJUNCTION

The temporary restraining order was issued because the advertisement wrongly conveys the impression that a class action has been certified in Louisiana. However, advertisement will not be prohibited that is intended to communicate essential information to permit Louisiana residents to make intelligent choices. It is essential that Louisiana citizens know that the right to "opt out" of the New York class action cannot be conditioned, that under

proper circumstances, if other requirements of a class action are met, a class action may be certified in Louisiana as to those policyholders who elect to withdraw from the New York lawsuit.

The motion for a preliminary injunction is denied in so far as it would prohibit advertisement informing Louisiana citizens of a right to withdraw from the class action lawsuit in New York and to file a lawsuit seeking a class action in Louisiana.

It is ordered that the notice of intention required of any party, or counsel of record, intending to apply to the Court of Appeal, Fourth Circuit, be and it is hereby waived.

New Orleans, Louisiana, this 13th day of September, 1995.

/s/ Charles R. Ward
JUDGE

APPENDIX G

Supreme Court of Louisiana

FOR IMMEDIATE NEWS RELEASE

NEWS RELEASE # 071

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the *3rd day of September, 1999,* the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

* * *

REHEARINGS DENIED:

98-C - 0551 MAJOR BANKS, CHRISTOPHER EDWARDS, ET AL v. THE NEW YORK LIFE INSURANCE CO., ET AL (Parish of Pointe Coupee)
CALOGERO, C.J. - would grant a rehearing.
KIMBALL, J. - not on panel, recused.
JOHNSON, J. - would grant a rehearing.
VICTORY, J. - recused

AMY, J. (ad hoc) - would grant a rehearing.

* * *

(2)

No. 99-1026

In The

Supreme Court of the United States

MAJOR BANKS, *ET AL.*,

Petitioners,

VERSUS

NEW YORK LIFE INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court, State Of Louisiana

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Petitioners did not make any argument based on the federal Full Faith and Credit Clause before the Louisiana trial court, in their briefs to the Louisiana First Circuit Court of Appeals, or in their original application or briefs to the Louisiana Supreme Court. It was not until an application for a second rehearing before the Louisiana Supreme Court that petitioners raised a federal full faith and credit issue. None of the state courts addressed or mentioned any purported full faith and credit argument. In these circumstances, was the federal full faith and credit issue sufficiently raised in or addressed by the state courts to support this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a)?

B. In 1995, a New York state court, in light of the terms of a settlement between the parties and applying New York procedural law as it was then construed, certified a nationwide settlement class in a proceeding brought against New York Life Insurance Company. As a provision of the settlement, New York Life Insurance Company did not contest certification. Petitioners here opted out of the New York state court proceeding, and filed a separate suit against New York Life Insurance Company in Louisiana state court seeking certification pursuant to Louisiana procedural law of a class of Louisiana residents. Does the Full Faith and Credit Clause of the United States Constitution require the Louisiana Supreme Court to accord the New York state court's certification of a settlement class, made pursuant to New York procedural law and without actually being litigated,

QUESTIONS PRESENTED – Continued

with the effect of precluding a different certification result in this Louisiana state court case involving different plaintiffs and applying Louisiana procedural law to a contested non-settlement class?

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STATEMENT OF THE CASE

This class action against New York Life Insurance Company ("New York Life") was brought by petitioners on the heels of previously filed and consolidated nationwide class actions against New York Life pending in New York state court, *sub nomine Willson v. New York Life Ins. Co.* (Sup. Ct. N.Y. Co., Index No. 94/127804) (hereinafter "*Willson*"). Plaintiffs' assertion that the *Willson* court's certification of a settlement class under New York procedural law, from which these plaintiffs opted out, is *res judicata* and commands certification of a contested non-settlement class under Louisiana procedural law is not worthy of the exercise of this Court's discretionary review, and does not satisfy any of the considerations enunciated in Rule 10 of the Rules of this Court.

A. The *Willson* Case

Willson was a consolidation of four separate nationwide class actions against New York Life filed in New York state court in 1994 and 1995. [Petition Appendix E2 at ¶ 1].[1] On July 28, 1995, the parties in *Willson* executed a stipulation of settlement which provided various forms of relief for class members, depending on the type of policy owned, with an estimated value exceeding $250 million. In addition, New York Life waived certain defenses, such as statutes of limitations defenses, and agreed to provide certain relief to class members without a showing of fault, injury or damage, all of which would likely have

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[1] "Petition Appendix ___" refers to the appendices attached to and filed with plaintiffs' Petition for Writ of *Certiorari*.

destroyed the predominance of common issues had the case proceeded to trial. [Petition Appendix E16-17 at ¶ 26]. Furthermore, an alternative dispute resolution component of the settlement, by which claims of misrepresentation and fraud would be decided on an individual basis for each class member rather than on a classwide basis, enabled such claims to be "resolved by means of a fast, efficient, fair and cost-free mechanism that avoids the time and expense of both individual litigation and the individual mini-trials on causation, reliance and damages that would likely be required were this action to proceed in litigation." [Petition Appendix E49-50 at ¶ 61].

After due notice and a fairness hearing, the *Willson* trial court entered "Findings of Fact, Conclusions of Law, and Final Order and Judgment," [Petition Appendix E], in which it concluded that the New York procedural requirements for class certification had been met as a result of the settlement terms. In the words of the court, "common issues of law and fact predominate *in light of the ADR Process included in the settlement . . . .* " [Petition Appendix E19-20 at ¶ 29 (b)(ii) (emphasis supplied)]. Adequacy of the *Willson* class representatives was satisfied by "the combination of the individualized ADR Process and the no-fault Class Relief benefits [which] accommodates much better than class actions are usually able to any variations between Class Members." [*Id.*, E23 at ¶ 29(d)(iii)]. Even superiority was satisfied because of the settlement: "The Court finds that, *given the proposed settlement,* a class action is clearly superior to other methods for the fair and efficient adjudication of this controversy." [*Id.* at ¶ 29(e) (emphasis supplied)]. In short: *"Given the settlement, and specifically its Alternative*

Dispute Resolution component, the Court finds that the requirements of CPLR 901 and 902 are satisfied by this settlement Class and therefore finally certifies the settlement Class." [Petition Appendix E24 at ¶ 31 (emphasis supplied)]. The judgment was affirmed on appeal. *Willson v. New York Life Ins. Co.*, 228 A.D. 2d 368, 644 N.Y.S. 2d 617 (N.Y. App. 1996). Significantly, New York Life did not oppose certification in the context of the settlement.[2]

B. The *Speaks* Case

After notification of the proposed *Willson* settlement and during the period afforded putative class members to opt out, a purported class action suit was filed in a Louisiana state court on behalf of Louisiana policyholders, in the matter entitled *Speaks v. New York Life Insurance Co.*, No. 95-12441 in the Civil District Court for the Parish of Orleans. Because all plaintiffs in *Speaks* had not opted out of *Willson*, however, New York Life sought a stay of *Speaks* in deference to *Willson*. The *Speaks* court granted the stay as to those *Speaks* plaintiffs who had not opted out of *Willson*, but permitted *Willson* opt-outs to proceed. [*Speaks* Stay Order, Petition Appendix F4].

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[2] Plaintiffs indicate that New York Life has taken contrary positions, opposing certification in Louisiana while arguing in favor of certification in New York. *See* Petition for Writ of *Certiorari* at 6, 19, 24. In fact, New York Life has advanced no contrary positions. It did not argue in favor of or take any position as to certification of a settlement class under New York law, and it has contested certification of a non-settlement class under Louisiana law.

Speaks, which did not involve any of the named plaintiffs here, later was voluntarily dismissed.

C. The *Banks* Case

Shortly after the granting of a partial stay in *Speaks*, plaintiffs filed the instant action on behalf of only Louisiana residents who had opted out of *Willson*. The putative class consisted of Louisiana residents who purchased approximately 1849 life insurance policies from among 1000 New York Life agents in different transactions over a thirteen-year period between January 1, 1982 and December 31, 1994. Petitioners contended that New York Life, through independent agents, misrepresented the nature of life insurance products to each class member and improperly encouraged some class members to replace pre-existing coverage. Petitioners claimed that New York Life was liable to each class member for fraud, negligent misrepresentation, negligence, breach of the duty of good faith and fair dealing, and breach of contract.

In the trial court, petitioners and New York Life vigorously contested the propriety of class treatment under Louisiana law. At the certification hearing, New York Life offered deposition transcripts from each of the class representatives, testimony from New York Life representatives, and substantial documentary evidence. This evidence demonstrated that petitioners' claims rested upon highly individualized alleged oral and written misrepresentations and were susceptible to a wide range of individual affirmative defenses, including several dependent upon a variety of circumstances unique to each class

member. Petitioners in turn sought to minimize the myriad individualized issues, arguing that the "common thread" of New York Life's alleged conduct created sufficient "common character" to support certification under Louisiana law.

Plaintiffs did not use the words "full faith and credit" in their pleadings or briefs before the Louisiana trial court, nor did they raise any purported federal constitutional issue. The trial court addressed no such issue in its order certifying a class. Instead, the court concluded that the requisite "common character" existed based upon the alleged conduct of New York Life, but it failed to take into account all of the individualized issues unique to each class member, or to address how such issues could be managed on a classwide basis. New York Life appealed.

Before the appellate court, petitioners raised the *Willson* certification, but only in their brief in support of rehearing. [Plaintiffs'/Appellees' Brief in Support of Motion for Rehearing *en banc* at 9-11]. Even then, they made no federal full faith and credit argument, instead merely tossing out the phrase "full faith and credit" in their argument regarding comity. *Id.* Plaintiffs did not cite to the United States Constitution or to any other federal authority in support of that argument. The Louisiana First Circuit Court of Appeals, like the trial court, did not address any purported federal full faith and credit argument in its decision. [Petition Appendix C]. The appellate court focused solely on the propriety of class certification under Louisiana law, and reversed. *Id.*

Petitioners applied for review by the Louisiana Supreme Court. In their application and original briefs, petitioners again raised the *Willson* certification as a matter of comity, and used the phrase "full faith and credit" only in the context of the comity argument. [Plaintiffs'/Applicants' Original Application and Memorandum for Writ of Review at 15-17, and Brief Submitted On Behalf of Plaintiffs/Applicants at 5-7]. The Louisiana Supreme Court did not address any purported full faith and credit argument, but rather addressed the procedural issue of class certification pursuant to Louisiana law. [Petition Appendix B]. The Court concluded that the trial court had properly exercised its discretion in certifying a class.

On application by New York Life, the Louisiana Supreme Court granted rehearing and reversed its previous decision. The Court explained that class treatment was inappropriate pursuant to Louisiana procedural law because the number of individualized issues requiring individual adjudication demonstrated both an absence of "common character" and that class treatment was not the superior method of fair and efficient adjudication. [Petition Appendix A12]. Again, petitioners did not advance a federal full faith and credit argument, and the Louisiana Supreme Court did not address the issue. [*See* Opposition to Application of Respondent New York Life Insurance Company for Rehearing, Supplemental Brief of Plaintiffs/Applicants, and Petition Appendix A].

Petitioners then filed an application for a second rehearing in which for the very first time they raised whether, pursuant to the federal Full Faith and Credit Clause, the decision in *Willson* regarding an uncontested settlement class under New York procedural law bound

the Louisiana courts' determination regarding certification of a contested non-settlement class under Louisiana procedural law. [Application of Major Banks, *et al.* For Rehearing at 19]. In its summary denial of petitioners' application, the Louisiana Supreme Court did not address this belatedly raised federal full faith and credit argument.

REASONS FOR DENYING THE PETITION

I. This Court Does Not Have Jurisdiction To Entertain Plaintiffs' Petition

Plaintiffs concede that the jurisdiction of this Court for review of a purported federal question can only be invoked where that question was "clearly raised and articulated" in the courts below. [Petition for Writ of *Certiorari* at 9]. Here, review of plaintiffs' various submissions to and the decisions of the state courts, reveals that plaintiffs' full faith and credit argument (the sole basis of plaintiffs' petition to this Court) was neither adequately presented in the state system nor addressed in any manner by the state courts. Instead, throughout the proceedings and until a second application for rehearing to the Louisiana Supreme Court, plaintiffs did not invoke the Full Faith and Credit Clause of the United States Constitution. Indeed, it was only in the application for a second rehearing that plaintiffs referred to the United States Constitution itself, rather than merely to principles of comity[3] or judicial admissions, and only on that

[3] While full faith and credit sets forth the "minimum requirements which each state must observe when asked to

application did plaintiffs arguably raise a "full faith and credit" federal constitutional challenge to the decisions of the state courts.[4]

The proper exercise by this Court of jurisdiction over a state court judgment requires that the judgment involve a federal question that was properly pressed or passed upon by the state court. 28 U.S.C. § 1257(a).[5] "Ordinarily the federal issue is presented too late if it is first raised in a motion for new trial, is raised for the first time on appeal, is not presented with the clarity required by state appellate procedure, or is not advanced until a petition for rehearing addressed to the decision of the highest

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apply the law [or enforce judgments] of a sister state," *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 516 (1953), the forum state's principles of comity may require deference beyond that minimum. *See Brady v. Brown*, 51 F.3d 810, 816 (9th Cir. 1995) ("[t]he doctrine of comity is based on 'respect for the sovereignty of other states or countries,' and under it 'the forum state will generally apply the substantive law of a foreign sovereign to causes of action that arise there' ").

[4] This fact is amply demonstrated by the plaintiffs' own Petition to this Court, and New York Life urges careful review of the quotations appearing on pages 4-6 of the Petition. For example, petitioners quote from their original brief to the Louisiana Supreme Court: "Likewise *principles of comity* require that the findings of the New York Court regarding class certification be given full faith and credit." [Petition for Writ of *Certiorari* at 6 (emphasis supplied)].

[5] Final decisions by highest state courts may be reviewed by *certiorari* when the validity of a federal treaty or statute, or of a state statute seen as repugnant to federal law, is "drawn in question," or when any title, right, privilege or immunity is "specially set up or claimed" under federal law. 28 U.S.C. § 1257(a).

state appellate court." 16B Wright, Miller, & Cooper, FEDERAL PRACTICE AND PROCEDURE § 4022 (2d ed. 1996); *see also Webb v. Webb*, 451 U.S. 493, 497 (1981).

This Court lacks jurisdiction to review the final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal claim was *adequately* presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-97 (1981). Generalized attacks upon the validity of a holding or vague references to the Constitution are insufficient to warrant review. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988). When the highest state court does not discuss a federal issue, that omission is deemed to be due to lack of proper presentation. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983). This Court will not decide issues that were advanced for the first time on a petition for rehearing in the court below, *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549-50 (1987), nor will it consider state court decisions involving federal constitutional issues raised for the first time on review. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *see also Mellon v. O'Neil*, 275 U.S. 212 (1927). Instead, " '[a]t the minimum . . . there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.' " *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988) (*citing Webb v. Webb*, 451 U.S. 493, 501 (1981)).

Where a petitioner fails to raise a federal question until applying for rehearing to a state supreme court, as here, the federal question has not been raised sufficiently

to support review by this Court. It was for this very reason that the Court in *Exxon Corp v. Eagerton*, 462 U.S. 176 (1983), held that it had no jurisdiction to consider the preemption argument there advanced by petitioners. The *Exxon* Court noted that the record was devoid of any indication that the petitioners had raised the issue in the trial court. *Id.* at 181 n.3. Although the allegedly preempting federal statute at issue was discussed on rehearing before the state supreme court, that court did not pass on the issue. *Id.* Thus, this Court concluded, "[u]nder these circumstances we have no jurisdiction to consider whether the [federal statute] . . . preempted the application of the [state statute], . . . for it does not affirmatively appear that that issue was decided below." *Id.* Likewise, in *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549-550 (1987), this Court concluded it had no jurisdiction because the "[a]ppellants did not present the [federal question] squarely to the state courts until they filed their petition for rehearing with the Court of Appeal," *id.*, and because the state courts did not address the federal question.

Petitioners may argue that their use of the words "full faith and credit" in briefs to the state courts sufficiently raised a federal question. Such an argument is without merit, however, as demonstrated by this Court's decision in *Webb v. Webb*, 451 U.S. 493, 495-496 (1981). *See also Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988) (constitutional challenge to excessiveness of punitive damage award not sufficiently raised to support jurisdiction). There, the Court observed that "the petitioner did use the phrase 'full faith and credit' at several points in the proceedings below, [but] nowhere did she

cite to the Federal Constitution or to any cases relying on the Full Faith and Credit Clause of the Federal Constitution." *Webb*, 451 U.S. at 495-496. Moreover, the state courts did not address any federal question, prompting this Court to explain: "when 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.' " *Id.*

Here, as in *Webb*, the state courts did not address the purported federal full faith and credit issue and, as in *Webb*, petitioners merely made vague references to "full faith and credit" in the context of their comity arguments. In addition, prior to their application for a second rehearing before the third court to consider certification, petitioners did not cite to the Constitution or to any cases relying on the Constitution. Thus, as in *Webb*, the federal full faith and credit issue was not sufficiently raised before the state courts.

While petitioners here did invoke the federal Full Faith and Credit Clause in the application for a second rehearing, the Louisiana Supreme Court did not pass on the issue. Indeed, there would have been no basis for the Louisiana Supreme Court to address this newly asserted argument since that issue had never been presented sufficiently in or addressed by the lower state courts: The Louisiana Supreme Court itself has no appellate jurisdiction to address and decide issues raised before it but not ruled upon by the trial court. *Twin Parish Port Comm'n v. Berry Bros., Inc.*, 94-2594 (La. 2/20/95), 650 So. 2d 748, *writ denied*, 95-2665 (La. 1/5/96), 666 So. 2d 288. As a result, this Court lacks jurisdiction to entertain petitioners'

full faith and credit challenge, and the Petition for Writ of *Certiorari* should be denied.

II. Plaintiffs' Purported Full Faith and Credit Challenge Is Without Merit and Unworthy of Review

A full faith and credit determination involves a two-step inquiry. First, a court must determine whether the type of judgment in question would have preclusive effect under the law of the state that rendered the initial judgment. *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 375 (1996). If the answer to that inquiry is in the affirmative, a court must next consider if there exists a valid basis for collateral attack of that decision. The full faith and credit argument advanced by plaintiffs fails the first prong of this test, obviating the need to consider the second.

A. *Willson* Certification Is Not *Res Judicata* Because Identity of Parties Is Absent

Contrary to plaintiffs' argument, it is clear that New York courts would find that the *Willson* judgment does not render class certification in this case *res judicata*. For *res judicata* to apply under New York law, there must be an identity of parties in both proceedings. *New York State Dormitory Authority v. Board of Trustees of Hyde Park Fire and Water Dist.*, 239 A.D. 2d 502, 657 N.Y.S. 2d 444, 445 (N.Y. App. 1997); Restatement of Judgments Second § 34(3). Indeed, petitioners themselves declare that "[u]nder New York law, 'The doctrine of *res judicata* precludes litigation of matters that could or should have

been raised in a prior proceeding *between the parties.*' " [Petition for Writ of *Certiorari* at 19 (emphasis added; citations omitted)]. The New York court in *Willson*, however, specifically afforded petitioners the right to opt out of its proceedings so that they might avoid the application of *res judicata* and pursue their claims elsewhere. Petitioners availed themselves of that right and opted out. Thus, they were not parties to the *Willson* proceeding and *res judicata* (or claim preclusion) does not apply. *See Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 n.5 (1979); Restatement of Judgments Second § 34(3).

B. Certification in *Willson* Has No Collateral Estoppel Effect Here

Presuming that plaintiffs' Petition can be read to advance an argument based on issue preclusion or collateral estoppel, such an argument is likewise untenable. The first of two requisites under New York law for application of collateral estoppel does not exist: there is no identity of issues. *Kaufman v. Eli Lilly and Co.*, 65 N.Y. 2d 449, 482 N.E.2d 63, 492 N.Y.S. 2d 584 (N.Y. 1985). Identity is lacking because (1) class certification was not actually litigated and adjudicated in *Willson*, and (2) class certification here and in *Willson* rest on the application of distinct procedural rules in markedly different situations. *Halyalkar v. Board of Regents*, 72 N.Y. 2d 261, 527 N.E. 2d 1222, 532 N.Y.S. 2d 85 (N.Y. 1988).

1. Identity of Issues Is Absent Because Certification in *Willson* Was Not Actually Litigated

Under the New York law of collateral estoppel, there is no identity of issues if, as here, the matter sought to be precluded was not contested in the prior proceeding. *Kaufman v. Eli Lilly and Co.*, 65 N.Y. 2d 449, 456, 482 N.E. 2d 63, 67, 492 N.Y.S. 2d 584, 589 (N.Y. 1985); *Halyalkar v. Board of Regents*, 72 N.Y. 2d 261, 267, 527 N.E.2d 1222, 1225-26, 532 N.Y.S. 2d 85, 89-90 (N.Y. 1988). In *Kaufman*, for example, the New York Court of Appeals found that, although the legal and factual issues in two matters were essentially the same, there was no identity for collateral estoppel purposes because the defendant had not challenged application of the legal theory in the first proceeding. As the Court explained, "[a]n issue is not actually litigated if, for example, there has been a default, a confession of liability, a failure to place a matter in issue by proper pleading or even because of a stipulation." *Kaufman v. Eli Lilly and Co.*, 65 N.Y. 2d 449, 456-57, 482 N.Ed. 2d 63, 67, 492 N.Y.S. 2d 584, 589 (N.Y. 1985).

Likewise, in *Halyalkar*, the New York Court of Appeals held that "the first [collateral estoppel] requirement – identicality of the issue – was not satisfied," *Halyalkar v. Board of Regents*, 72 N.Y. 2d 261, 266, 527 N.E. 2d 1222, 1224-25, 532 N.Y.S. 2d 85, 88 (N.Y. 1988), and refused to accord collateral estoppel effect to a prior administrative order because that order had not been contested and the issues therefore had not actually been litigated or determined. *Id.*, 72 N.Y. 2d at 267, 532 N.E. 2d at 1225, 532 N.Y.S. 2d at 88-89. As the Court noted, the

rule against according collateral estoppel effect to uncontested matters "is founded on considerations of fairness and recognizes that if preclusive effect were given to issues not truly adjudicated the result would be to discourage compromises and to accord them consequences which the parties neither intended or foresaw." *Id.*, 72 N.Y. 2d at 267, 527 N.E. 2d at 1226, 532 N.Y.S. 2d at 89.

The reasoning of *Halyalkar* and *Kaufman* informs the result here. The *Willson* ruling was based upon a stipulated settlement between New York Life and the *Willson* class representatives, pursuant to which New York Life did not contest certification. Class certification in *Willson* was not actually litigated or adjudicated, and therefore *Willson* can have no preclusive effect here.

2. Identity Of Issues Is Absent Because *Willson*, Unlike Here, Addressed Application of New York Procedural Law To A Settlement Class

Collateral estoppel also cannot apply because the class certification issues before the *Willson* court were substantially different from those presented here. *Balcerak v. County of Nassau*, 1999 N.Y. LEXIS 3927 (N.Y. Dec. 16, 1999). Not only do the two proceedings involve the application of the distinct procedural laws of two different states, but the underlying factual issues are markedly different since *Willson*'s findings rested heavily upon the terms of the class settlement before it.

A simple comparison of the New York and Louisiana class certification statutes shows that their provisions are not identical. *Compare* N.Y. C.P.L.R. § 901 *with* former La.

Code Civ. Pro. art. 591.[6] The New York rule "is a synthesis of the provisions of Rule 23(a)(1) and (b)(3) of the Federal Rules of Civil Procedure." 3 Weinstein, Korn, & Miller, *New York Civil Practice – CPLR* ¶ 901.11 (1999). In contrast, former Louisiana Code of Civil Procedure article 591 required a showing of " 'common character' among the rights of the representatives of the class and the absent members of the class." Thus, while Louisiana courts may accord persuasive authority to Federal Rule of Civil Procedure 23 and interpretive federal case law, they have not hesitated to diverge from it. *See, e.g., CitiCorp Person-to-Person Financial Center, Inc.*, 409 So. 2d 391, 393 (La. App. 4th Cir. 1982) (refusing certification, noting that "[t]o this extent, the criteria of revised Federal Rule 23 has been rejected by our legislature"). As explained by one court, the Louisiana class action rules are "not as explicit or inflexible as the federal rules," and have been developed in "an evolutionary case-by-case [manner] wherein guidelines have been suggested without the imposition of a concretized procedure." *Livingston Parish Policy Jury v. Illinois Cont. Gulf R. Co.*, 432 So. 2d 1027, 1029 (La. App. 1st Cir. 1983). Petitioners' effort to minimize the distinctions between New York law and the applicable Louisiana law by arguing that both are identical to Federal Rule of Civil Procedure 23 is of no avail.

Such distinctions between the law applied in the prior proceeding and the law applicable to the present proceeding demonstrate a lack of identity of issues and

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[6] Louisiana Code of Civil Procedure article 591 was revised in 1997, after this proceeding commenced. Former article 591 applies in this case. Petition Appendix A8 at n.8.

prevent application of collateral estoppel under New York law. *Balcerak v. County of Nassau*, 1999 N.Y. LEXIS 3927, *5 (N.Y. Dec. 16, 1999). In *Balcerak*, for example, an injured corrections officer obtained a favorable judgment from the New York Workers Compensation Board based on its finding that his injury was work-related. In a subsequent proceeding for additional benefits pursuant to another statute, he advanced the earlier judgment as conclusive proof that he was "injured in the performance of his duties." *Id.* The Court of Appeals, however, noted that although the statutes used similar "operational phrases," the language was not necessarily " 'interchangeable' ." *Id.* The Court therefore rejected application of collateral estoppel, finding that eligibility for benefits under the two statutes "should . . . stand and be resolved essentially on their own merits." *Id.* at *8. Likewise, class certification determinations pursuant to the distinct procedural laws of two different states "should . . . stand and be resolved essentially on their own merits."

Acceptance of petitioners' argument essentially would require Louisiana courts to apply the procedural rules of another state. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) ("[s]ince the procedural rules of its courts are surely matters on which a State is competent to legislate, it follows that a State may apply its own procedural rules to actions litigated in its courts"). Such a result would deny Louisiana the "legislative jurisdiction to which [it is] entitled." *Id.* at 727. In the context of procedural matters, including class certification, the decision of a court in one state should have no preclusive effect in

a different jurisdiction, which is free to impose different procedural standards.

Thus, courts have refused to accord preclusive effect to class certification orders made pursuant to the laws of other jurisdictions. For example, in *Cullen v. Margiotta*, 811 F.2d 698, 732-33 (2d Cir.), *cert. den.*, 483 U.S. 1021 (1987), the federal court refused to give preclusive effect to the prior denial of class certification by a New York state court. In rejecting the defendants' assertion that collateral estoppel precluded maintenance of a class action, the court in *Cullen* explained that there is no identity of issues "when the standards governing [the issues] are significantly different." *Id.* at 732. Similarly, in refusing to enjoin class certification in a subsequent and virtually identical proceeding brought in Texas state court, the federal court in *J.R. Clearwater, Inc. v. Ashland Chemical Co.*, 93 F.3d 176, 180 (5th Cir. 1996), noted that the discretionary nature of class certification "dictates that each court – or at least each jurisdiction – be free to make its own determination in this regard."

Likewise, in *Morgan v. Deere Credit, Inc.*, 889 S.W.2d 360, 367-69 (Tex. Ct. App. 1994), the Texas court rejected the argument that a previous federal district court decision certifying a permissive class under Federal Rule of Civil Procedure 23(b)(3) rather than a mandatory class under Federal Rule 23(b)(1) required that it also reject a mandatory class and certify a permissive class under the Texas Rules of Civil Procedure. Even though Texas Rules of Civil Procedure 42(b)(1) and (2) and Federal Rules of Civil Procedure 23(b)(1) and (2) are identical in terminology, the court found no identity of issues, explaining that "[n]ot only is there a difference in some of the rules, those

rules that are identical sometimes have been applied differently by Texas courts." *Id.* at 367-68; *see also In re Michael Lebner*, 197 B.R. 180, 188 (D. Mass. 1996) (refusing to accord preclusive effect to prior class certification by Massachusetts state court). Louisiana state courts should likewise be free to construe and apply their own procedural rules without being bound to New York procedural rules as construed by a New York state court.

Moreover, the context in which the *Willson* certification was decided is markedly different than the situation presented here. The *Willson* court's certification rested heavily on the existence of the settlement and its alternative dispute resolution provisions;[7] here, in contrast, there is neither a settlement nor alternative dispute resolution procedures for the adjudication of the many individualized issues that formed the basis of the Louisiana Supreme Court's denial of certification. Instead, there is a full evidentiary record, arising from a hotly contested certification hearing, which demonstrates great disparity among plaintiffs and a myriad of highly individualized issues.

Plaintiffs erroneously rely on this Court's decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), in an attempt to equate this case with the settlement class certified in *Willson*. *Amchem Products*, however, does not affect the crucial distinctions between *Willson* and this case. First, *Willson* was decided in 1995, prior to the ruling in *Amchem Products*, and it would be improper to

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[7] As demonstrated on pages 1-3, *supra*, the *Willson* court expressly relied on the settlement and its terms in certifying a class.

measure its ruling by a standard that did not exist in New York at the time. Indeed, *Amchem Products* expressly recognized that many courts had long held "that settlement obviates or reduces the need to measure a proposed class against the enumerated Rule 23 requirements." *Id.* at 618. Further, *Amchem Products* addressed the findings necessary for certification of a settlement class under federal procedure, not under state rules such as those applied in *Willson*.

Additionally, even in clarifying that a settlement class must meet the legal requirements for certification, *Amchem Products* did not entirely eliminate consideration of a settlement from class certification analysis. "[S]ettlement is relevant to a class certification. . . . Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial." *Id.* Here, unlike *Willson*, no settlement eliminates the "intractable management problems" presented by petitioners' proposed class.[8]

Finally, petitioners' effort to use the *Speaks* proceeding to support their full faith and credit argument is unavailing. The *Speaks* court merely stayed its proceeding as a matter of comity as to those members of the *Speaks*

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[8] Interestingly, plaintiffs seek to use the *Willson* order certifying a class while simultaneously rejecting the findings underlying that same order. For example, plaintiffs ignore the *Willson* holding that class certification was only appropriate "[g]iven the settlement, and specifically its Alternative Dispute Resolution component." [Petition Appendix E24 at ¶ 31].

purported class who had not opted out of *Willson*, which at that time was still pending final determination. Nothing about that court's decision demonstrates any error in the Louisiana Supreme Court's subsequent decision against certifying a class of *Willson* opt-outs in this case.

CONCLUSION

As a preliminary matter, this Court need not consider the merits of plaintiffs' Petition: the purported federal principle that forms the sole basis for that Petition was not adequately raised in or addressed by the state courts below. This Court therefore has no jurisdiction to entertain this Petition pursuant to 28 U.S.C. § 1257(a).

Should this Court nonetheless determine jurisdiction is present, the issues raised by plaintiffs do not merit consideration. The Louisiana Supreme Court properly applied Louisiana procedural class certification rules, and the Full Faith and Credit Clause of the United States Constitution requires no different result. Moreover, the New York courts would not accord to the *Willson* certification the preclusive effect advocated by plaintiffs. Certification in *Willson* was uncontested and therefore was not "actually litigated and determined," and the identity of issues between *Willson* and this case, required for

application of collateral estoppel, does not exist. Plaintiffs' Petition should be denied.

Respectfully submitted,

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